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New York (State) Courts
443

THE MISCELLANEOUS REPORTS.

CASES DECIDED

IN THE

COURTS OF RECORD

OF THE

STATE OF NEW YORK

OTHER THAN THE

Court of Appeals and the Appellate Division of the Supreme Court,

INCLUDING

THE APPELLATE TERM OF THE SUPREME COURT FOR THE HEARING OF APPEALS FROM THE CITY COURT OF THE CITY OF NEW YORK FOR THE BOROUGHS OF MANHATTAN AND THE BRONX AND THE MUNICIPAL COURTS OF THE CITY OF NEW YORK FOR THE BOROUGHS OF MANHATTAN AND THE BRONX; SPECIAL TERMS AND TRIAL TERMS OF THE SUPREME COURT, CITY COURT OF THE CITY OF NEW YORK, THE COURT OF GENERAL SESSIONS OF THE PEACE IN AND FOR THE CITY AND COUNTY OF NEW YORK, COUNTY COURTS, AND OF THE SURROGATES' COURTS, IN PURSUANCE OF LAWS OF 1892, CHAPTER 598.

ROBERT G. SCHERER, REPORTER.

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** Designated pursuant to sec. 12, Art. VI. of the Constitution.

† Appointed December 26, 1901, vice David McAdam, deceased.

‡ Appointed June 9, 1902, vice Miles Beach, deceased

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CASES REPORTED IN THIS SERIES WHICH HAVE BEEN AFFIRMED OR REVERSED.

	Vol.	Page.
American Press Assn. v. Brantingham	37	426
Affirmed: 75 App. Div. 435.		
Bottjer v. Supreme Council	37	406
Affirmed: 78 App. Div. 546.		
Bowery Bank v. Hart	37	412
Reversed: 77 App. Div. 121.		
Brown v. Fish	37	367
Reversed: 76 App. Div. 329.		
Brown v. Guichard	37	78
Affirmed: 77 App. Div. 642.		
Chatfield v. Campbell	35	355
Affirmed: 75 App. Div. 631.		
City of New York v. Reesing	38	129
Affirmed: 77 App. Div. 417.		
Crandall & Godley Co. v. Eddy Confectionery Co.	37	745
Affirmed: 78 App. Div. 644.		
Dayton v. American Steel Barge Co.	36	223
Affirmed: 76 App. Div. 454.		
Downs v. City of New York	38	649
Reversed: 75 App. Div. 423.		
Driscoll v. City of New York	38	453
Affirmed: 78 App. Div. 52.		
Dupignac v. Bernstrom	37	677
Affirmed: 76 App. Div. 105.		
Fiske v. Parke	39	157
Affirmed: 77 App. Div. 422.		
Garvey v. Horgan	38	164
Affirmed: 77 App. Div. 391.		
Goldstein v. New York University	38	93
Reversed: 76 App. Div. 80.		
Gordon v. Ashley	34	743
Reversed: 77 App. Div. 525.		
Green v. Mussey	38	287
Reversed: 76 App. Div. 174.		
Gubbitosi v. Rothschilds	37	99
Reversed: 75 App. Div. 477.		

Digitized by Google

	Vol.	Page.
Hall v. Irvin	38	123
Reversed: 78 App. Div. 107.		
Hamlin v. Stevens	32	434
Affirmed: 78 App. Div. 629.		
Hanna v. People's National Bank	35	517
Reversed: 76 App. Div. 224.		
Holt v. Fleischman	37	172
Reversed: 75 App. Div. 593.		
Hunter v. Hunter	38	672
Reversed: 78 App. Div. 631.		
Ideal Cash Register Co. v. Zurnino	38	808
Reversed: 39 Misc. Rep. 311.		
Jenkins v. Baker	36	55
Reversed: 77 App. Div. 509.		
Loeb v. Firemen's Insurance Co.	38	107
Affirmed: 78 App. Div. 113.		
McDonald v. Metropolitan St. R. Co.	36	703
Reversed: 75 App. Div. 559.		
Matter of Bieber	36	341
Affirmed: 76 App. Div. 619.		
Matter of Board of Public Improvements	38	509
Reversed: 77 App. Div. 351.		
Matter of Bullard	37	663
Affirmed: 76 App. Div. 207.		
Matter of East One Hundred and Eighty-second Street	34	592
Reversed: 76 App. Div. 612.		
Matter of Grant Avenue	34	724
Affirmed: 76 App. Div. 87.		
Matter of Miller	37	449
Reversed: 77 App. Div. 473.		
Matter of Morrison	38	328
Reversed: 75 App. Div. 480.		
Matter of Rintelen	37	462
Affirmed: 77 App. Div. 142.		
Matter of Rose	35	21
Affirmed: 75 App. Div. 615.		
Matter of Sudds	32	182
Appeal dismissed: 75 App. Div. 612.		
Matter of Townsend Avenue	35	65
Affirmed: 76 App. Div. 612.		
Matter of Treadwell	37	584
Reversed: 77 App. Div. 155.		
Matter of Woolley	38	353
Modified: 78 App. Div. 224.		
Medical College Laboratory v. New York University	35	80
Affirmed: 76 App. Div. 48.		

Digitized by Google

	Vol.	Page.
Merchant v. White	37	376
Affirmed: 77 App. Div. 539.		
Murphy v. Board of Education	38	706
Affirmed: 76 App. Div. 620.		
New York Cement Co. v. Consolidated Rosendale Cement Co.	37	746
Reversed: 76 App. Div. 285.	38	518
Nichols v. Park	38	176
Reversed: 78 App. Div. 95.		
Paige v. Schenectady R. Co.	38	384
Reversed: 77 App. Div. 571.		
Pease v. Freiwald	38	805
Affirmed: 39 Misc. Rep. 549.		
People v. Martin	38	67
Reversed: 77 App. Div. 396.		
People v. Murray	37	687
Reversed: 76 App. Div. 118.		
People ex rel. Barnett v. Johnston	38	645
Affirmed: 75 App. Div. 630.		
People ex rel. Consolidated Gas Co. v. Feitner	38	178
Modified: 78 App. Div. 313.		
People ex rel. Meyer v. Gould	38	505
Affirmed: 75 App. Div. 524.		
People ex rel. N. Y. C. & H. R. R. R. Co. v. Feitner	38	204
Reversed: 75 App. Div. 527.		
People ex rel. N. Y., N. H. & H. R. R. Co. v. Board of Railroad Commissioners	39	1
Affirmed: 76 App. Div. 302.		
Phillips v. United States Grand Lodge	37	869
Reversed: 39 Misc. Rep. 296.		
Remson v. Hyams	35	345
Affirmed: 76 App. Div. 611.		
Robinson v. New York & Texas S. S. Co.	36	705
Affirmed: 75 App. Div. 431.		
Robinson v. Supreme Commandery	38	97
Affirmed: 77 App. Div. 215.		
Roux v. Rothschild	37	435
Affirmed: 78 App. Div. 637.		
Sargent v. Board of Education	35	321
Affirmed: 76 App. Div. 588.		
Schuyler v. Booth	37	35
Affirmed: 76 App. Div. 619.		
Shaw v. Manhattan Avenue R. Co.	35	47
Reversed: 78 App. Div. 290.		
Sondheim v. Brooklyn Heights R. R. Co.	36	339
Affirmed: 75 App. Div. 624.		

Digitized by Google

	Vol.	Page.
Soper v. St. Regis Paper Co.	38	294
Affirmed: 76 App. Div. 409.		
Steinway v. Steinway	36	294
Affirmed: 78 App. Div. 207.		
Tew v. Wolfsohn	38	54
Affirmed: 77 App. Div. 454; 174 N. Y. 272.		
Tyler v. Village of Lansingburgh	37	604
Affirmed: 76 App. Div. 165.		

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TABLE

OF

CASES REPORTED.

A.

	Page.
Abbot, Matter of	760
Abramsohn, Levy v.	781
Adams v. Slingerland	638
Adler v. Kramer	642
Allen v. United Cigar Stores Co.	500
Allen, Welker v.	523
American Loan & Trust Co., People v.	647
Anhalt v. Lightstone	822
Arnot v. Hills	95
Automatic Vending Co. v. Heins.	788
Azoy, Ely v.	669

B.

Bailey v. Kraus	845
Barnard v. Jersey	212
Barnett v. Walker	323
Barney v. City of New York	719
Becker, Forgotson v. 813,	816
Becker, Matter of	756
Bigelow v. Tilden	169
Biggars, Matter of	426
Bingham, Davis v.	299
Birnstein v. Stuyvesant Ins. Co.	808
Bloomingdale, Simmon v.	847
Blum v. Dabritz	800
Board of Railroad Commissioners, People ex rel. New York, N. H. & H. R. R. Co. v.	1
Bondy v. Platt	838
Bowery Savings Bank, Ranney v.	301
Bradish, Kunhardt v.	103
Brady, Veriscope Co. v.	835
Brady, Woods Motor Vehicle Co. v.	79
Brewster, Matter of	689
Brodsky, German Savings Bank v.	100
Burden v. Burden Iron Co.	559
Burden Iron Co., Burden v.	559
Burke v. Rhoads	208
Bursky, Powell v.	533
Butler v. Duke	235

C.

Canavan v. John Hancock Mutual Life Ins. Co.	782
Capobianco, Lauria v.	441
Carey Mfg. Co., People ex rel. v. Commissioners of Taxes	282
Carpenter v. Mergert	634
Chaffee, Cothren v.	339
Chesebrough, Le Roy v.	285
Childs v. Skillin	825
Christianson v. O'Neil	11
Churchill, Stryker v.	578
Citizens' State Bank v. Cowles	571
City of Ironwood v. Coffin	278
City of New York, Barney v.	719
City of New York, Cunningham v.	197
City of New York, Hastings v.	728
City of New York v. Henderson.	351
City of New York, Jaeger v.	543
City of New York, Kastor v.	709
City of New York, Whitman v.	43
City of Oswego, Donovan v.	291
City Trust, Safe Deposit & Surety Co., McDonald v.	552
Clark, People ex rel. v. Warden of Sing Sing Prison	113
Clarke, Matter of	73
Coffin, City of Ironwood v.	278
Cohn, Johnson v.	189
Coleman v. Graves Co.	85
Collins, Matter of	753
Collins, Veit v.	39
Commissioners of Taxes, People ex rel. Carey Manf. Co. v.	282
Conklin, Le Brantz v.	715
Conklin, Matter of	771
Conlon, Haughian v.	584
Conlon v. Mission of Immaculate Virgin	215
Cord Meyer Co., People ex rel. v. Feitner	467
Cosel, Rothoser v.	337
Cothren v. Chaffee	339
Cowles, Citizens' State Bank v.	571
Craig v. Robertson	792
Craige, People ex rel. v. Fox	591
Criterion Club, Cullinan v.	270
Croker, People ex rel. v. Sturgis.	448
Cruikshank v. Cruikshank	401

Digitized by Google

	Page.
Cullinan v. Criterion Club	270
Cullinan (Campbell Certificate), Matter of	646
Cullinan (Flynn Certificate), Matter of	558
Cullinan (Gallagher Certificate), Matter of	354
Cullinan (Kuch Certificate), Matter of	641
Cullinan (McCue Certificate), Matter of	636
Cullinan (Young Certificate), Matter of	354
Cullinan v. Parker	446
Cunningham v. City of New York.	197
Curtis v. Natalie Anthracite Coal Co.	586

D.

Dabritz, Blum v.	800
Davidson, Greenberg v.	796
Davis v. Bingham	299
Davis v. Davis	90
Dease v. Reese	657
De Jonge, Zion v.	839
Democratic General Committee, People ex rel. Garvey v.	724
De Young, Hare v.	366
Diefenthaler, Matter of	765
Di Medicis, People v.	438
Donovan v. City of Oswego.	291
Douglas, Scott v.	555
Downs, Matter of	621
Dresser v. Travis	358
Drury, Matter of	288
Duke, Butler v.	235
Duke, Elmes v.	244
Dun, Matter of	616

E.

Eadie, Matter of	117
Eagan v. New York Transportation Co.	111
East One Hundred Fifty-eighth Street, Matter of	598
East One Hundred Seventy-third Street, Matter of	598
Edison Electric Illuminating Co., People ex rel. v. Feitner	463
Ellis, McCorkle v.	790
Ellner v. Priestley	535
Elmes v. Duke	244
Elster, Matter of	63
Ely v. Azoy	669
Endelman, Skillen v.	261
Ennis, Vanevery v.	836
Enterprise Vending Machine Co., Steinhaus v.	797

F.

Farmers' Loan & Trust Co., New Jersey Construction Co. v.	672
Faville v. Hadcock	397
Feitner, People ex rel. Cord Meyer Co. v.	467
Feitner, People ex rel. Edison Electric Illuminating Co. v.	463
Feitner, People ex rel. New York Edison Co. v.	474
Fenlon, Le Vie v.	265
Fidelity & Casualty Co., Shea v.	107
Finnegan, Jacquemin v.	628
Fiske v. Parke	157
Fohs v. Rain	316
Foody, People v.	142
Forbes v. Wheeler	538
Forgotson v. Becker	813, 816
Forster, People ex rel. v. Warden.	700
Forty-second Street R. R. Co., Knickerbocker Ice Co. v.	27
Foster v. Retail Clerks' International Protective Assn.	48
Fox, People ex rel. Craige v.	591
Freiwald, Pease v.	549
Freundlich, Tanenbaum v.	819
Fromme v. Union Surety & Guaranty Co.	105
Fuchs, Horowitz v.	344

G.

Gabel v. Williams	489
Gallagher v. Geneva, Waterloo, S. F. & C. L. T. Co.	637
Garden City Co. v. Schnugg.	840
Garvey, People ex rel. v. Democratic General Committee	724
Geneva, Waterloo, S. F. & C. L. T. Co., Gallagher v.	637
German Savings Bank v. Brodsky.	100
Gewirz, Schorr v.	186
Gilman, Matter of	762
Goldie v. Goldie	389
Goldsmith, Schrieber v.	381
Graf, Tobin v.	412
Graham, Matter of	226
Grantz, Ronginsky v.	347
Grau, Sturgis v.	330
Graves Co., Coleman v.	85
Green v. Tuchner	154
Green, Village of Brockport v.	231
Greenberg v. Davidson	796
Greenberg, Oshinsky v.	342
Greenwich Ins. Co., Townsend v.	87
Grout, McDonald v.	18
Gurley, Minor v.	662
Guttroff, Matter of	483

H.

Haas v. Zimmermann	304
Hadcock, Faville v.	397
Harder, Walker v.	749
Hare v. De Young	366
Hasberg v. Moses	25
Hastings v. City of New York.	728

Digitized by Google

	Page.
Hanghian v. Conlon	584
Havens, Lazzari v.	255
Hart, Matter of	356
Heins, Automatic Vending Co. v.	788
Henderson, City of New York v.	351
Herter, Mittler v.	843
Hildebrant, Vacheron v.	61
Hiller & Sons, Jefferson Real Estate Co. v.	784
Hills, Arnot v.	95
Hitchins, Matter of	767
Hoffman v. Roessle	787
Hohle v. Randrup	334
Holbrook, Matter of	139
Hollingsworth, Honigstein v.	314
Honigstein v. Hollingsworth	314
Horn, Matter of	133
Horowitz v. Fuchs	344
Horton, Leask v.	144
Hosack, Matter of	130
Hosmer v. Standard Shoe Machinery Co.	204
Huntington, Matter of	477

I.

Ideal Cash Register Co. v. Zunino	311
Illensworth v. Illensworth	194

J.

Jackson, White v.	218
Jacobs, People ex rel. v. McGirr	471
Jacquemin v. Finnegan	628
Jaeger v. City of New York	543
Jefferson Real Estate Co. v. Hiller & Sons	784
Jenkins, Matter of	618
Jersey, Barnard v.	212
Jewett v. Schmidt	502
John Hancock Mutual Life Ins. Co., Canavan v.	782
Johnson v. Cohn	189
Joyce, People ex rel. v. New York Magdalen Benevolent Society	588

K.

Kalchheim, Leinhardt v.	308
Kallis v. Lissberger	773
Kastor v. City of New York	709
Keen, Matter of	374
Keene v. Newark Watch Case Material Co.	6
Kelley, Root v.	530
Kirkland v. Kirkland	423
Klein, Kohler v.	353
Klipstein & Co. v. Marchmedt	794
Knickerbocker Ice Co. v. Forty-second Street R. R. Co.	27
Kohler v. Klein	353
Kramer, Adler v.	642
Kraus, Bailey v.	845
Kroncke, People ex rel. v. O'Brien	110
Kunhardt v. Bradish	103

L.

Lane, Matter of	522
Lang v. Lutz	3
Langley v. Westchester Trust Co.	735
Larner, Matter of	377
Lauria v. Capobianco	441
Lawyer, People ex rel. v. Supervisors	162
Lazzari v. Havens	255
Leahy v. Mooney	829
Leask v. Horton	144
Le Brantz v. Conklin	715
Le Brun, Matter of	516
Leggett v. Waller	408
Leinhardt v. Kalchheim	308
Leo, Schwoerer v.	505
Le Roy v. Chesebrough	285
Lesser v. Stein	349
Le Vie v. Fenlon	265
Levy v. Abramsohn	781
Lewisohn, People ex rel. v. O'Brien	456
Lewisohn, People ex rel. v. Wyatt	456
Lightstone, Anhalt v.	822
Lincoln Safe Deposit Co., Putnam v.	738
Liss, Matter of	123
Lissberger, Kallis v.	773
Longstreet, McWhirter v.	831
Ludwig, Righter v.	416
Lutz, Lang v.	3
Lux, Roussel v.	508
Lyman Place, Matter of	598

M.

McCorkle v. Ellis	790
McDonald v. City Trust Safe Deposit & Surety Co	552
McDonald v. Grout	18
McDonough, Matter of Gillespie v.	147
McGirr, People ex rel. Jacobs v.	471
McSwegan, Russell & Co. v.	306
McWhirter v. Longstreet	831
Main, Schuck v.	251
Marchmedt, Klipstein & Co. v.	794
Matter of Abbot	760
Matter of Becker	756
Matter of Biggars	426
Matter of Brewster	689
Matter of Clarke	73
Matter of Collins	753
Matter of Conklin	771
Matter of Cullinan (Campbell Certificate)	646
Matter of Cullinan (Flynn Certificate)	558
Matter of Cullinan (Gallagher Certificate)	354

Digitized by Google

	Page.
Matter of Cullinan (Kuch Certificate)	641
Matter of Cullinan (McCue Certificate)	636
Matter of Cullinan (Young Certificate)	354
Matter of Diefenthaler	765
Matter of Downs	621
Matter of Drury	288
Matter of Dun	616
Matter of Eadie	117
Matter of East One Hundred Fifty-eighth Street	598
Matter of East One Hundred Seventy-third Street	598
Matter of Elster	63
Matter of Gillespie v. McDonough	147
Matter of Gilman	762
Matter of Graham	226
Matter of Guttroff	483
Matter of Hayt	356
Matter of Hitchins	767
Matter of Holbrook	139
Matter of Horn	133
Matter of Hosack	130
Matter of Huntington	477
Matter of Jenkins	618
Matter of Keen	374
Matter of Lane	522
Matter of Larner	377
Matter of Le Brun	516
Matter of Liss	123
Matter of Lyman Place	598
Matter of Mertens	512
Matter of Miner	605
Matter of Mitchell	120
Matter of Moench	480
Matter of Murphy	166
Matter of Page	220
Matter of Parsons	126
Matter of Ryon	698
Matter of Schmidt	77
Matter of Scrimgeour	128
Matter of Sogaard	519
Matter of Stewart	275
Matter of Thomas	136, 223
Matter of Timerson	675
Matter of Toole v. Ogden	581
Matter of Wait	74
Matter of Walker	680
Matter of Warner	432
Matter of Weiss	71
Matter of Wheeler	484
Matter of Wiegand	454
Matter of Wilmot	686
Mergert, Carpenter v.	634
Mertens, Matter of	512
Metropolitan St. R. Co., O'Sullivan v.	268
Metropolitan St. R. Co., Scarry v.	802
Miner, Matter of	605
Minor v. Gurley	662
Mission of Immaculate Virgin, Conlon v.	215
Mitchell, Matter of	120
Mittler v. Herter	843
Moench, Matter of	480
Monroe, People ex rel. Standard Water Meter Co. v.	369
Mooney, Leahy v.	829
Morgan, Sunshine v.	778
Moses, Hasberg v.	25
Moses, Ninth National Bank v.	664
Mott Iron Works v. Reilly	833
Munger Vehicle Tire Co. v. Rubber Goods Manf. Co.	817
Murphy, Matter of	166

N.

Natalie Anthracite Coal Co., Curtis v.	586
National Bank of Republic v. Thurber	13
New Jersey Construction Co. v. Farmers' Loan & Trust Co.	672
New York Edison Co., People ex rel. v. Feitner	474
New York Magdalen Benevolent Society, People ex rel. Joyce v.	588
New York, N. H. & H. R. R. Co., People ex rel. v. Board of Railroad Commissioners	1
New York Public Library v. Tilden	169
New York & Queens County R. Co., Yula v.	59
New York Security & Trust Co., Zander v.	98
New York Transportation Co., Eagan v.	111
Newark Watch Case Material Co. Keene v.	6
Newland v. Zodikow	541
Ninth National Bank v. Moses	664

O.

O'Brien, People ex rel. Kroncke v.	110
O'Brien, People ex rel. Lewisohn v.	456
Ogden, Matter of Toole v.	581
O'Neil, Christianson v.	11
Onward Construction Co., Power v.	707
Osborne v. Seligman	811
Oshinsky v. Greenberg	342
O'Sullivan v. Metropolitan St. R. Co.	268

P.

Page, Matter of	220
Paine, Tuell v.	712
Parke, Fiske v.	157

Digitized by Google

Page.

Parker, Cullinan v. 446
Parsons, Matter of..... 126
Pease v. Freiwald..... 549
People v. American Loan & Trust Co. 647
People v. Di Medicis 438
People v. Foody 142
People ex rel. Carey Manf. Co. v. Commissioners of Taxes..... 282
People ex rel. Clark v. Warden of Sing Sing Prison..... 113
People ex rel. Cord Meyer Co. v. Feitner 467
People ex rel. Craige v. Fox..... 591
People ex rel. Croker v. Sturgis... 448
People ex rel. Edison Electric Illuminating Co. v. Feitner..... 463
People ex rel. Forster v. Warden. 700
People ex rel. Garvey v. Democratic General Committee..... 724
People ex rel. Jacobs v. McGirr... 471
People ex rel. Joyce v. New York Magdalen Benevolent Society... 588
People ex rel. Kroncke v. O'Brien. 110
People ex rel. Lawyer v. Supervisors 162
People ex rel. Lewisohn v. O'Brien. 456
People ex rel. Lewisohn v. Wyatt. 456
People ex rel. New York Edison Co. v. Feitner..... 474
People ex rel. New York, N. H. & H. R. R. Co. v. Board of Railroad Commissioners..... 1
People ex rel. Standard Water Meter Co. v. Monroe..... 369
People ex rel. Taber Prang Art Co. v. Wells..... 602
Phillips v. United States Grand Lodge 296
Picker v. Weiss..... 22
Plass v. Weil..... 777
Platt, Bondy v. 838
Powell v. Bursky..... 533
Power v. Onward Construction Co. 707
Priestley, Ellner v. 535
Proskey, Smith v. 385
Putnam v. Lincoln Safe Deposit Co. 738

R.

Rain, Fohs v. 316
Randrup, Hohle v. 334
Ranger v. Thalmann..... 420
Ranney v. Bowery Savings Bank. 301
Reese, Dease v. 657
Reilly, Mott Iron Works v. 839
Retail Clerks' International Protective Assn., Foster v. 48
Rhoads, Burke v. 208
Rhoads, Sanford v. 548
Righter v. Ludwig..... 416

Page.

Robertson, Craig v. 792
Rockefeller v. St. Regis Paper Co. 746
Roessle, Hoffman v. 787
Ronginsky v. Grantz..... 347
Root v. Kelley..... 530
Rothoser v. Cosel..... 337
Roussel v. Lux..... 508
Rubber Goods Manf. Co., Munger Vehicle Tire Co. v. 817
Russell & Co. v. McSwegan..... 306
Ryon, Matter of..... 698

S.

St. Regis Paper Co., Rockefeller v. 746
Salomon, Stevens v. 159
Sanford v. Rhoads..... 548
Scarry v. Metropolitan St. R. Co. 802
Schmidt, Jewett v. 502
Schmidt, Matter of 77
Schnugg, Garden City Co. v. 840
Schorr v. Gewirz..... 186
Schrieber v. Goldsmith..... 381
Schuck v. Main..... 251
Schwoerer v. Leo..... 505
Scott v. Douglas..... 555
Scrimgeour, Matter of..... 128
Seligman, Osborne v. 811
Shea v. Fidelity & Casualty Co... 107
Simmon v. Bloomingdale..... 847
Skillen v. Endelman..... 261
Skillin, Childs v. 825
Slingerland, Adams v. 638
Smith v. Proskey..... 385
Sogaard, Matter of..... 519
Standard Shoe Machinery Co., Hosmer v. 204
Standard Water Meter Co., People ex rel. v. Monroe..... 369
Stein, Lesser v. 349
Steinhaus v. Enterprise Vending Machine Co. 797
Stevens v. Salomon..... 159
Stewart, Matter of..... 275
Stryker v. Churchill..... 578
Sturgis v. Grau..... 330
Sturgis, People ex rel. Croker v. .. 448
Stuyvesant Ins. Co., Birnstein v. . 808
Sunshine v. Morgan..... 778
Supervisors, People ex rel. Lawyer v 162

T.

Taber Prang Art Co., People ex rel. v. Wells..... 602
Talcott v. Wabash R. R. Co..... 443
Tanenbaum v. Freundlich 819
Terry, Whiteley v. 93
Thalmann, Ranger v. 420
Thomas, Matter of..... 136, 223
Thurber, National Bank of Republic v. 13

Digitized by Google

	Page.
Tilden, Bigelow v.	169
Tilden, New York Public Library v.	169
Timerson, Matter of	675
Tobin v. Graf	412
Townsend v. Greenwich Ins. Co.	87
Travis, Dresser v.	358
Tuchner, Green v.	154
Tuell v. Paine	712

U.

Union Surety & Guaranty Co., Fromme v.	105
Unique Electric Device Co., Weil v.	527
United Cigar Stores Co., Allen v.	500
United States Grand Lodge, Phillips v.	296

V.

Vacheron v. Hildebrant	61
Vanevery v. Ennis	836
Van Winkle v. Van Winkle	593
Veit v. Collins	39
Veriscope Co. v. Brady	835
Village of Brockport v. Green	231

W.

Wabash R. R. Co., Talcott v.	443
Wait, Matter of	74
Walker, Barnett v.	323
Walker v. Harder	749
Walker, Matter of	680
Waller, Leggett v.	408
Warden, People ex rel. Forster v.	700
Warden of Sing Sing Prison, People ex rel. Clark v.	113
Warner, Matter of	432
Weil, Plass v.	777
Weil v. Unique Electric Device Co.	527
Weiss, Matter of	71
Weiss, Picker v.	22
Welker v. Allen	523
Wells, People ex rel. Taber Prang Art Co. v.	602
Westchester Trust Co., Langley v.	735
Wheeler, Forbes v.	538
Wheeler, Matter of	484
White v. Jackson	218
Whiteley v. Terry	93
Whitman v. City of New York	43
Wiegand, Matter of	454
Williams, Gabel v.	489
Wilmot, Matter of	686
Woods Motor Vehicle Co. v. Brady	79
Wyatt, People ex rel. Lewisohn v.	456

Y.

Yula v. New York & Queens County R. Co.	59
Yutte v. Yutte	272

Z.

Zander v. New York Security & Trust Co.	98
Zimmermann, Haas v.	304
Zion v. De Jonge	839
Zodikow, Newland v.	541
Zunino, Ideal Cash Register Co. v.	311

Digitized by Google

TABLE OF CASES CITED.

A.

		Page.
Abbott v. Hockenberger	31 Misc. Rep. 587	524
Accetta v. Zupa	54 App. Div. 33	95
Ackerman v. Rubens	167 N. Y. 405	313
Adair v. Brimmer	74 N. Y. 539	625
Adams v. Anderson	23 Misc. Rep. 705	420
Adams v. Emerson	6 Pick. 58	631
Adams v. Rivers	11 Barb. 390	52
Adler v. Lumley	46 App. Div. 230	258
Adler v. Metropolitan El. R. Co.	138 N. Y. 173	721
Agawam Co. v. Jordan	7 Wall. 583	565
Albany Hardware & Iron Co. v. Day	11 App. Div. 230	423
Albright v. Kempton	4 Civ. Pro. 16	660
Allen v. Bishop's Executors	25 Wend. 414	609
Allen v. Flood	L. R. (App. Cas. 1898) 1	54
Ames v. Meriam	98 Mass. 294	576
Ametrano v. Downs	62 App. Div. 405; 70 N. Y. Supp. 833	435
Anderson v. Anderson	112 N. Y. 104	496
Anderson v. Blood	152 N. Y. 285	193
Andrews v. Andrews	12 Ind. 348	384
Anon	3 Abb. N. C. 161	394
Anthony v. Wood	96 N. Y. 180	158
Antisdel v. Williamson	165 N. Y. 375	8

B.

Baker v. Disbrow	18 Hun, 29	627
Balcom v. Adams	15 Civ. Pro. 198	243
Baldwin v. Genung	70 App. Div. 271	13
Barbour v. De Forest	95 N. Y. 13	414
Barney v. City of New York	38 Misc. Rep. 549	720
Barry v. Brown	2 Dem. 309	766
Bascom v. Smith	34 N. Y. 320	180
Bauer v. Dewey	166 N. Y. 402	281
Baxter v. McDonnell	154 N. Y. 432	16, 106
Baxter v. Winwooski Turnpike Co.	22 Vt. 114	631
Beadleston v. Beadleston	20 N. Y. St. Repr. 21	393
Beals v. Home Ins. Co.	36 N. Y. 522	532
Beattie v. Callanan	67 App. Div. 14	58
Beaver v. Beaver	117 N. Y. 428	430
Beck v. McGillis	9 Barb. 35	436
Becker v. Lawton	4 Dem. 342	515
Beekman v. Bonsor	23 N. Y. 298	736
Beekman v. Third Ave. R. R. Co.	153 N. Y. 144	721
Beers v. Shannon	73 N. Y. 292	542
Belton v. Hatch	109 N. Y. 593	411
Benjamin v. Dimmick	4 Redf. 7	72
Bennett v. Garlock	79 N. Y. 302	364
Benson v. Clark	1 Cow. 258	524
Benson v. Corbin	145 N. Y. 351	92
Berry v. Schaad	28 Misc. Rep. 389; 50 App. Div. 132	321

Digitized by Google

		Page.
Betts v. Betts	4 Abb. N. C. 317	138
Bigler v. Duryee	73 Hun, 556	240
Bishop v. McClelland	44 N. J. Eq. 450	197
Bissell v. Collins	28 Mich. 277	631
Bissell v. N. Y. C. R. R. Co	23 N. Y. 61	598
Bisson v. West Shore R. R. Co	143 N. Y. 125	685
Blackman v. Riley	138 N. Y. 318	633
Blanchard v. Myers	9 Johns. 66	453
Blandy v. Griffith	3 Fed. Cas. 576	565
Blodgett v. Race	18 Hun, 132	458
Bloodgood v. Clark	4 Paige, 574	661
Bloodgood v. Slayback	54 App. Div. 634	248
Blott v. Rider	47 How. Pr. 90	395
Blount v. Walker	28 S. C. 545	138
Board of Education v. Quick	99 N. Y. 138	320
Bogardus v. New York Life Ins. Co	101 N. Y. 328	7
Bohn Mfg. Co. v. Hollis	54 Minn. 223	57
Bonnell v. Griswold	62 N. Y. 294	7
Booth v. Farmers & Mechanics' Bank	50 N. Y. 396	334
Born v. Schrenkeisen	110 N. Y. 55	384
Borrowe v. Corbin	31 App. Div. 172; 165 N. Y. 634	586
Bostwick v. Frankfield	74 N. Y. 207	180
Bowdish v. Page	153 N. Y. 104	553
Bowen v. Idley	6 Paige, 46	717
Bowen v. Sweeney	89 Hun, 359; affd., 154 N. Y. 780	364
Boynton v. Hoyt	1 Den. 53	362
Brackett v. Griswold	112 N. Y. 454	243
Brande v. Grace	154 Mass. 210	161
Brewer v. Ford	54 Hun, 116	313
Brigham v. Zaiss	48 App. Div. 144	308
Brinckerhoff v. Bostwick	88 N. Y. 52	6, 247
Brokaw v. Duffy	165 N. Y. 391	310
Brooklyn Park Com. v. Armstrong	45 N. Y. 234	36
Brown v. Clark	77 N. Y. 369	196
Brown v. Frost	10 Paige, 247	213
Brown v. New Jersey	175 U. S. 174	461
Brown v. Reiman	48 App. Div. 295	423
Browning v. Bettis	8 Paige, 568	660
Bruff v. Mali	36 N. Y. 200	243
Bryden v. Bryden	11 Johns. 187	576
Bucki v. Bucki	26 Misc. Rep. 69	276
Budd v. Walker	29 Hun, 344	384
Buffalo & J. R. R. Co. v. Gifford	87 N. Y. 294	84
Bull v. Bank of Kasson	123 U. S. 105	576
Bull v. Odell	19 App. Div. 605; 46 N. Y. Supp. 306	771
Bundy v. Catto	61 Ill. App. 209	631
Bunn v. Croul	10 Johns. 239	524
Burbank v. Fay	65 N. Y. 70	37
Burnham v. Comfort	37 Hun, 216; affd., 108 N. Y. 535	72
Burr v. De La Vergne	102 N. Y. 415	569
Butler v. Butler	41 App. Div. 477	503

C.

Caesar v. Rubinson	71 App. Div. 180	351, 645
Cafre v. Lockwood	22 App. Div. 11	537
Cagwin v. Town of Hancock	84 N. Y. 532	235
Campbell v. Heiland	55 App. Div. 95	17
Campbell v. Holt	115 U. S. 620	483
Campbell v. Morgan	68 Hun, 490	274
Campbell v. Stokes	142 N. Y. 29	104

Digitized by Google

		Page
Carmichael v. Carmichael	4 Keyes, 346	684
Carpenter v. Carpenter	30 N. Y. St. Repr. 955	393
Carter v. Beckwith	128 N. Y. 312	379
Carter v. Good	57 Hun, 116	250
Carter v. Holahan	92 N. Y. 498	182
Carter v. Palmer	8 Cl. & Fin. 657	368
Casco National Bank v. Clark	139 N. Y. 307	575
Case v. Mechanics' Banking Assn	4 N. Y. 166	573
Caton v. Southwell	13 Barb. 335	660
Cawley v. People	95 Ill. 249	290
Cazeaux v. Mali	25 Barb. 578	242
Champney v. Coope	32 N. Y. 543	180
Child v. Starr	4 Hill, 369	633
Chipman v. Montgomery	63 N. Y. 221	585
Chouteau v. Suydam	21 N. Y. 179	225
Christopher & T. St. R. R. Co. v. Twenty-third St. R. Co	149 N. Y. 51	511
Church v. Gilman	15 Wend. 656	273
City of Ironwood v. Coffin	38 Misc. Rep. 339	280
City of New Haven v. Sargent	38 Conn. 50	631
Claflin v. Meyer	75 N. Y. 260	339
Clark v. Barnes	76 N. Y. 301	183
Clark v. Ennis	65 App. Div. 164	248
Clark v. King & Brother Pub. Co	40 App. Div. 405	42, 49
Clark v. Kingsley	37 Hun, 246	72
Clark v. Lynch	46 Barb. 68	685
Clemens v. Clemens	60 Barb. 366	363
Clift v. White	15 Barb. 70; 12 N. Y. 519	180
Cluff v. Day	124 N. Y. 195	770
Cochrane v. Schryver	12 Daly, 174	324
Cockcroft v. New York & H. R. R. Co.	69 N. Y. 203	188
Cohen v. Climax Cycle Co	19 App. Div. 159	664
Cohen v. United Garment Workers	35 Misc. Rep. 748	58
Cohn v. Baldwin	74 Hun, 346	424
Cole v. Malcolm	66 N. Y. 363	163
Collyer v. Collyer	6 N. Y. St. Repr. 693	628
Commonwealth v. Brown	167 Mass. 144	117
Commonwealth v. Cooley	10 Pick. 37	146
Conaughty v. Nichols	42 N. Y. 83	713
Cone v. Empire Plaid Mills	12 App. Div. 314	588
Connell v. Stalker	20 Misc. Rep. 423	58
Conover's Case	5 Abb. Pr. 182; 25 Barb. 429	453
Consolidated Ice Co. v. Mayor	53 App. Div. 260; affd., 166 N. Y. 92	36, 46
Continental Nat. Bank v. Eliot Nat. Bank	7 Fed. Repr. 369	357
Cook v. Hecht	64 Mo. App. 273	631
Cook v. Lowry	95 N. Y. 104	415
Cooley v. Lobdell	153 N. Y. 596	217
Coon v. Brook	21 Barb. 546	399
Coon v. Knap	8 N. Y. 402	62
Cooper v. Benedict	3 Dem. 136	66
Copley Iron Co. v. Pope	108 N. Y. 236	529
Corbett v. De Comeau	54 How. Pr. 506	241
Corley v. McElmeel	149 N. Y. 228	364
Corning v. Tooker	5 How. Pr. 16	409
Cornwell v. Clement	87 Hun, 50	184
Cotanch v. Grover	57 Hun, 279	632
Cotterell v. Brock	1 Bradf. 148	479
Coudert v. De Logerot	34 N. Y. Supp. 114	214
Counselman v. Hitchcock	142 U. S. 547	461
Cousins v. Swords	14 App. Div. 338	550

Digitized by Google

		Page.
Cowen v. Rinaldo	82 Hun, 479	362
Cowing v. Altman	71 N. Y. 435	576
Cragie v. Hadley	99 N. Y. 131	575
Crain v. Wright	114 N. Y. 307	273
Crawford v. McCarthy	159 N. Y. 514	436
Crawford v. Nassoy	55 App. Div. 433	222
Creamer v. Waller	2 Dem. 351	479
Crockett v. Crockett	73 Ga. 647	384
Cromwell v. Stephens	3 Abb. Pr. (N. S.) 26	691
Cronin v. Stoddard	97 N. Y. 271	291
Crouse v. Frothingham	97 N. Y. 105	17, 217
Cunningham v. Davenport	147 N. Y. 43	430
Curran v. Galen	152 N. Y. 53	58
Curtis v. Van Bergh	161 N. Y. 47	645

D.

Daniel v. Ferguson	L. R. 1891, 2 Ch. 27	161
Davenport v. Walker	57 App. Div. 221	58
Davis v. Davis	4 Misc. Rep. 454; affd., 150 N. Y. 571	394
Davis v. Elmira Sav. Bank	161 U. S. 275	357
Davis v. United Engineers	28 App. Div. 396	58
Davis v. Zimmerman	91 Hun, 489	58
Dean v. Mayor	167 N. Y. 13	200
De Camp v. Dempsey	10 Civ. Pro. 210	661
Decker v. Union Dime Sav. Inst	15 App. Div. 553	430
Deering v. Reilly	167 N. Y. 184	633
De Lacey v. Walcott	13 N. Y. Supp. 800	240, 249
Delafield v. Parish	25 N. Y. 35	66
Delafield v. Shipman	103 N. Y. 463	736
De Leon v. De Lima	66 How. Pr. 287	240
Del Genovese v. Third Ave. R. R. Co.	13 App. Div. 412	202
De Lisle v. Herbs	25 Hun, 487	180
De Mott v. Benson	4 Edw. Ch. 297	540
Dennison v. Plumb	18 Barb. 89	322
Denniston v. Clark	125 Mass. 216	631
De Sisto v. Stimmel	31 Misc. Rep. 711; 58 App. Div. 486	322
Despard v. Churchill	53 N. Y. 192	763
Detmold v. Drake	46 N. Y. 320	600
De Vivier v. Smith	6 Civ. Pro. 394	661
De Witt v. Yates	10 Johns. 158	758
Dieffenbach v. Roch	112 N. Y. 621	484
Donaldson v. Wood	22 Wend. 395	496
Donovan v. Main	74 App. Div. 44	529
Douglas v. Carpenter	17 App. Div. 329	713
Douglas v. Phenix Insurance Co	138 N. Y. 209	501
Downing v. Marshall	23 N. Y. 366	736
Doyle v. Lord	64 N. Y. 432	161
Du Bois v. Brown	1 Dem. 317	628
Dubois v. Cassidy	75 N. Y. 298	660
Dueber Watch Case Co. v. Howard Watch Co.	3 Misc. Rep. 582	58
Duer v. Fox	27 Misc. Rep. 676	230
Durst v. Brooklyn Heights R. R. Co.	33 Misc. Rep. 124	529
Duryea v. Mayor	62 N. Y. 592; 69 id. 477	732
Dustan v. McAndrew	44 N. Y. 78	312
Dutcher v. Porter	63 Barb. 15	540
Dutton v. Willner	52 N. Y. 312	368

Digitized by Google

E.

		Page.
Eames Vacuum Brake Co. v. Prosser	157 N. Y. 289	540
Earle v. Robinson	12 Misc. Rep. 536	313
Eisenlord v. Clum	126 N. Y. 552	745
Elizabeth v. Pavement Co	97 U. S. 126	565
Elting v. Vanderlyn	4 Johns. 237	102
Elwood v. City of Rochester	43 Hun, 102	294
Ely v. Ehle	3 N. Y. 509	326
Emanuel v. Ennis	48 N. Y. Super. Ct. 430	420
Embury v. Sheldon	68 N. Y. 227	736
English v. Brennan	60 N. Y. 609	633
Eno v. Diefendorf	102 N. Y. 720	384
Equitable Life Assurance Society v. Brennan	148 N. Y. 661	507
Erie & New York City R. R. Co. v. Owen	32 Barb. 616	84
Estate of Farley	15 N. Y. St. Repr. 727	764
Estate of Gunther	N. Y. L. J., July 12, 1902	129
Estate of Haren	N. Y. L. J., August 15, 1902	226
Estate of Hosack	N. Y. L. J., November 22, 1897	132
Estate of Peck	10 N. Y. St. Repr. 698	66
Estate of Taylor	6 Misc. Rep. 277	772
Eten v. Luyster	60 N. Y. 259	344
Ettlinger v. Persian R. & C. Co	142 N. Y. 189	17
Evansville Nat. Bank v. Kaufmann	93 N. Y. 279	8
Everett v. Coffin	6 Wend. 603	326
Everett v. Saltus	15 Wend. 474; 20 id. 269	326
Everitt v. Everitt	29 N. Y. 39	736
Ex parte Fisher	18 Wend. 608	89
Ex parte Sanders	4 Cow. 544	453

F.

Farmers' Loan & Trust Co. v. Hendrickson	25 Barb. 484	553
Farnsworth v. Wood	91 N. Y. 308	4
Faxon v. Mason	76 Hun, 408	410
Feiber v. Smith	6 N. Y. Supp. 446	535
Fero v. Ruscoe	4 N. Y. 162	12
Ferrer v. Pyne	81 N. Y. 281	685
Fetch v. Gilman	22 Vt. 38	631
First Nat. Bank v. Harris	108 Mass. 514	576
First Nat. Bank v. Shuler	153 N. Y. 163	542, 667
Fischer-Hansen v. Brooklyn Heights R. R. Co.	63 App. Div. 356	107
Fisher v. Andrews	37 Hun, 176	6
Fitzburgh v. Everingham	6 Paige, 29	661
Fitzpatrick v. Brady	6 Hill, 581	612
Florence v. Sands	4 Redf. 210	436
Flynn v. Brooklyn City R. R. Co	158 N. Y. 493	247
Foot v. Stiles	57 N. Y. 399	291
Forman v. Smith	7 Lans. 443	66
Forsyth v. Burr	37 Barb. 540	479
Forsyth v. McKinney	56 Hun, 1	316
Fox v. Dixon	34 N. Y. St. Repr. 710	94
Frank v. Wessels	64 N. Y. 155	99
Franklyn v. Hayward	61 How. Pr. 43	180
Frazer v. People	6 Dem. 174	482
Freeland v. Robie	5 Misc. Rep. 528; 25 N. Y. Supp. 986	320

Digitized by Google

		Page.
Frothingham v. Broadway & Seventh Avenue R. R. Co.	9 Civ. Pro. 304	241
Fry v. Charter Oak Life Ins. Co.	31 Fed. Repr. 197	276
Fulton v. Whitney	66 N. Y. 548	368

G.

Gans v. Thieme	93 N. Y. 225	183
George v. People	167 Ill. 447	117
Germond v. Germond	6 Johns. Ch. 347	393
Gibbons v. Van Alstyne	29 N. Y. St. Repr. 461	524
Giddings v. Seward	16 N. Y. 365	436
Gilbert v. Mickle	4 Sandf. Ch. 357	58
Gill v. Smith	5 N. Y. Crim. 513	58
Gillespie v. Brooks	2 Redf. 349	225
Gilman v. Reddington	24 N. Y. 9	413
Glacius v. Fogel	88 N. Y. 435	609
Goldman v. Smith	2 Am. Bank. Rep. 107	260
Goldner v. Goldner	49 App. Div. 395	395
Goodrich v. McDonald	112 N. Y. 157	107
Gorham v. Gorham	40 App. Div. 564	395
Gould v. Cayuga Co. Nat. Bank	86 N. Y. 75; 99 id. 333	90
Graves v. Friend	5 Sandf. 568	62
Gray v. Booth	64 App. Div. 231	314
Gray v. Central R. R. Co.	82 Hun, 523	313
Gray v. Manhattan R. Co.	128 N. Y. 509	721
Gray v. Shepard	147 N. Y. 177	316
Greaves v. Gouge	69 N. Y. 154	6, 241
Green v. Carey	81 Hun, 496	240
Greene v. Greene	125 N. Y. 506	771
Greentree v. Rosenstock	61 N. Y. 583	713
Grerregani v. Wheelwright	3 Abb. Pr. (N. S.) 264	660
Griffen v. Dominguez	2 Duer, 656	276
Griswold v. Bay City	35 Mich. 452	631
Grocers' Bank v. Murphy	60 How. Pr. 426	411
Groves v. Rice	61 N. Y. St. Repr. 654	184
Gruman v. Smith	81 N. Y. 25	714

H.

Hafner v. Hafner	62 App. Div. 316	363
Hagerty v. Hagerty	9 Hun, 175	413
Hall v. Herter Brothers	90 Hun, 280	588
Hall v. Stevens	116 N. Y. 201	62
Halsey v. McCormick	13 N. Y. 296	633
Hamersley v. Mayor	56 N. Y. 536	600
Hancock v. Rand	94 N. Y. 10	695
Hangen v. Hachemeister	114 N. Y. 566	263
Hankins v. Mayor	64 N. Y. 18	496
Hankinson v. Vantine	152 N. Y. 20	305
Hannahs v. Hannahs	68 N. Y. 610	515
Hard v. Ashley	117 N. Y. 606	736
Harding v. Harding	43 N. Y. Super. Ct. 27	395
Hargous v. Stone	5 N. Y. 86	529
Harrison v. Totten	53 App. Div. 178	431
Hart v. Chase	67 App. Div. 445	241
Hasbrouck v. Angevine	17 N. Y. St. Repr. 738	182
Hascall v. King	162 N. Y. 134	361, 414
Hatch v. Bassett	52 N. Y. 362	196
Hatch v. Central Nat. Bank	78 N. Y. 487	749
Hathaway v. Payne	34 N. Y. 92	274

Digitized by Google

		Page.
Hauger v. Bernstein	7 Daly, 343	320
Haux v. Dry Dock Sav. Inst.	2 App. Div. 165	430
Hawes v. Oakland	104 U. S. 450	247
Hawley v. James	16 Wend. 61	362
Hayden v. Demets	53 N. Y. 426	312
Hayden v. Pierce	144 N. Y. 512	495
Hays v. Hibbard	3 Redf. 28	73
Heckmann v. Pinkney	81 N. Y. 211	670
Henderson v. Arbuckle	54 N. Y. Super Ct. 141	516
Herrick v. Woolverton	41 N. Y. 581	576
High v. Chick	81 Hun, 100	524
Hill v. Beebe	13 N. Y. 556	183
Himmelmann v. Hotaling	40 Cal. 111	575
Hine v. Hine	39 Barb. 507	73
Hiscock v. Lacy	9 Misc. Rep. 598	357
Holiday v. Peters	28 Beav. 349	368
Holloway v. Southmayd	139 N. Y. 390	633
Holly v. Hirsch	135 N. Y. 590	414
Holmes v. Willard	125 N. Y. 75	588
Hone v. Henriquez	13 Wend. 240	184
Hone v. Van Schaick	20 Wend. 564	362
Hopkins v. Meyer	76 App. Div. 367	546, 635
Horgan v. Mayor	160 N. Y. 516	203
Horsfield v. Black	40 App. Div. 264	503
Hovey v. Mayo	43 Me. 322	631
Howell v. Ransom	11 Paige, 538; 1 N. Y. Leg. Obs. 10	368
Hoysradt v. Kingman	22 N. Y. 372	766
Hulbert v. Clark	128 N. Y. 295	483
Hunt v. Fish	4 Barb. 324	305
Hunt v. Hunt	72 N. Y. 223	277
Hurlburt v. Durant	88 N. Y. 122	140
Hurtado v. California	110 U. S. 516	462
Huston v. City of Fort Atkinson	56 Wisc. 350	631
Hutchins v. Hutchins	7 Hill, 104	243
Hutchinson v. Lawrence	29 Hun, 450	249
Hutchinson v. Simpson	73 App. Div. 520	240
Hyatt v. Pugsley	23 Barb. 300	420
Hyde v. Woods	4 Otto, 94 U. S. 523	411

I.

Irving v. Irving	21 Misc. Rep. 743; 47 N. Y. Supp. 1052	771

J.

Jackson v. Hathaway	15 Johns. 447	633
Jackson v. Wood	12 Johns. 73	144
James v. Patten	6 N. Y. 9	145
Jansen v. Ball	6 Cow. 628	336
Jennings v. Jennings	7 N. Y. 547	362
Jerome v. Queen City Cycle Co.	163 N. Y. 351	316
Jex v. Jacob	19 Hun, 105	747
Jex v. Mayor	103 N. Y. 536	296
Jiminez v. Ward	21 App. Div. 387	250
Johnson v. Lawrence	95 N. Y. 154	770
Johnston v. Dahlgren	31 App. Div. 204; 166 N. Y. 357	94
Johnston Harvester Co. v. Meinhardt	9 Abb. N. C. 393	58
Jones v. Morrill	42 Barb. 623	325
Jordan v. Van Epps	85 N. Y. 427	217
Jurgens v. Rogge	16 Misc. Rep. 100	92

Digitized by Google

K.

		Page.
Kain v. Larkin	141 N. Y. 144	7, 529
Kalish v. Kalish	166 N. Y. 368	362, 414
Kane v. Elevated R. R. Co	125 N. Y. 183	36
Karst v. Gane	136 N. Y. 316	43, 553
Kayton v. Barnett	116 N. Y. 625	423
Kehrley v. Shafer	92 Hun, 196	525
Keiher v. Shipherd	4 Civ. Pro. 274	409
Kelty v. Second Nat. Bank	52 Barb. 328	576
Kenney v. Apgar	93 N. Y. 539	399
Kessler v. Levy & Levis Co	7 App. Div. 142	248
Kessler v. N. Y. C. & H. R. R. R. Co.	61 N. Y. 538	444
Ketchum v. Durkee	1 Barb. Ch. 480	387
Killam v. Allen	52 Barb. 605	362
Kilpatrick v. Johnson	15 N. Y. 322	414
King v. Talbot	40 N. Y. 76	627, 764
Kings County Fire Ins. Co. v. Stevens.	87 N. Y. 287	633
Kinnier v. Kinnier	45 N. Y. 535	277
Kitchen v. Lowery	127 N. Y. 53	555
Knickerbocker Ice Co. v. Forty-second Street R. R. Co	48 N. Y. Super. Ct. 489	48
Koenig v. Steckel	58 N. Y. 475	752
Kolzem v. Broadway & Seventh Ave. R. R. Co	1 Misc. Rep. 148; 48 N. Y. St. Repr. 656	701
Kountze v. Helmuth	67 Hun, 343	507
Kraft v. Freeman Printing & P. Assn.	87 N. Y. 628	588
Kratzenstein v. Lehman	19 App. Div. 228	135
Krebs v. Rosenstein	31 Misc. Rep. 661	57
Krower v. Reynolds	99 N. Y. 245	24
Krueger v. Schlinger	19 Misc. Rep. 221	125

L.

Lambert v. Craft	98 N. Y. 342	609
Lampman v. Milks	21 N. Y. 505	286
Lang v. Ropke	5 Sandf. 363	415
Langdon v. Astor's Exrs	16 N. Y. 9	72
Langdon v. Mayor	93 N. Y. 149	29, 46, 732
Lange v. Benedict	73 N. Y. 12	551
Lattimer v. Livermore	72 N. Y. 174	507
Lazier v. Westcott	26 N. Y. 146	277
Leary v. Rice	15 App. Div. 397	241
Lee v. Dill	11 Abb. Pr. 214	66
Leland v. Manning	4 Hun, 7	225
Lent v. McQueen	15 How. Pr. 313	661
Leslie v. Baillie	2 Younge & Collier, N. R. 91	674
Leslie v. Lorillard	110 N. Y. 519	247
Levene v. Hahner	62 App. Div. 195	441
Levin v. Robie	5 Misc. Rep. 529; 25 N. Y. Supp. 982	320
Levy v. Hill	50 App. Div. 297	188
Levy v. Metropolitan St. R. Co	34 Misc. Rep. 220	529
Levy v. Rosenstein	66 N. Y. Supp. 101	57
Lichtenberg v. Herdtfelder	103 N. Y. 302	17
Lister v. Hodgson	4 L. R. (Eq.) 34	384
Lockyer v. Lockyer	1 Edm. Cas. 107	394
Long Island Bottlers v. Bottling Brewers	65 App. Div. 459	240
Longobardi v. Yuliano	33 Misc. Rep. 472	351, 645
Lorillard v. Clyde	122 N. Y. 41	747
Lowenberg v. People	27 N. Y. 336	145

Digitized by Google

		Page.
Ladwig v. Bungart	26 Misc. Rep. 247; 48 App. Div. 613	217, 585
Lyman v. Cheever	168 N. Y. 43	108
Lyman v. Kurtz	166 N. Y. 274	641
Lyman v. Phillips	3 Dem. 459	766
Lynch v. Johnson	48 N. Y. 33	666
Lyon v. Ricker	141 N. Y. 225	745

M.

Maas v. O'Brien	14 Hun, 95	750
Mabie v. Bailey	95 N. Y. 206	429
McAlpine v. Potter	126 N. Y. 285	770
McCabe v. McCabe	67 App. Div. 589	26
McCartee v. Orphan Asylum Society	9 Cow. 437	495
McClain v. Williams	11 S. Dak. 227	328
McCleary v. McCleary	30 Hun, 154	395
McClellan v. Chipman	164 U. S. 347	357
McCreery v. Day	119 N. Y. 1	300
McCulloch v. Norwood	58 N. Y. 562	278
McDonald v. O'Hara	144 N. Y. 567	557
McElroy v. Kansas City	21 Fed. Repr. 264	722
McGillis v. McGillis	154 N. Y. 532	684
McKeown v. Fagan	4 Redf. 320	614
McKie v. Clark	3 Dem. 380	770
McNulty v. Hurd	72 N. Y. 521	75
McNutt v. Hilkins	80 Hun, 235	748
Mack v. Patchin	42 N. Y. 171	188
Macy v. Hastings	2 Law Bulletin, 87	243
Magee v. Vedder	6 Barb. 352	609
Maitland v. Baldwin	70 Hun, 270	413
Malcolm v. Miller	6 How. Pr. 456	41
Mandeville v. Avery	124 N. Y. 376	554
Mann v. Pentz	3 N. Y. 415	4
Margraf v. Muir	57 N. Y. 159	188
Marie v. Garrison	83 N. Y. 14	8
Markham v. Jaudon	41 N. Y. 235	713
Marre v. Ginochio	2 Bradf. 165	515
Marston v. Swett	66 N. Y. 206; 82 id. 526	563
Martin v. Clews	55 N. Y. Super. Ct. 552	240
Martin v. Funk	75 N. Y. 134	429
Massachusetts Nat. Bank v. Shinn	163 N. Y. 360	218
Masten v. Amerman	51 Hun, 246	662
Master Stevedores' Assn. v. Walsh	2 Daly, 1	58
Masterson v. Townshend	123 N. Y. 458	7, 670
Matter of Abbett	29 Misc. Rep. 567	135
Matter of Anthony & Co	42 App. Div. 66	240
Matter of Auerbach v. Johannsen	31 Misc. Rep. 44	647
Matter of Babcock	115 N. Y. 450	125
Matter of Barnard	48 App. Div. 424	647, 699
Matter of Bliss	6 App. Div. 192	772
Matter of Bolton	159 N. Y. 129	119
Matter of Bredenstein	Daily Reg., March 26, 1886	473
Matter of Brez	172 N. Y. 609	518
Matter of Bridge v. Mohrmann	36 App. Div. 533	647
Matter of Bronson	78 Hun, 351; 150 N. Y. 1	134, 240
Matter of Brown	154 N. Y. 313	736
Matter of Browne	35 Misc. Rep. 362; 71 N. Y. Supp. 1034	75
Matter of Bryan	3 Abb. N. C. 289	240
Matter of Butterfield	133 N. Y. 473	362
Matter of Callister	153 N. Y. 294	745

Digitized by Google

		Page.
Matter of Carey	14 Misc. Rep. 486	766
Matter of Carpenter	131 N. Y. 86	413
Matter of Chabot	44 App. Div. 340; affd., 167 N. Y. 280	134
Matter of Clarke	39 Misc. Rep. 73	518
Matter of Clausmann	5 N. Y. St. Repr. 329	66
Matter of Connoly	38 Misc. Rep. 533	132
Matter of Corbett	90 Hun, 182; 171 N. Y. 516	76, 772
Matter of Crerar	56 App. Div. 479	78
Matter of Dewey	153 N. Y. 63	504
Matter of Dorman	5 Dem. 112	620
Matter of Dounce	7 Civ. Pro. 426	240
Matter of Dows	167 N. Y. 597	138
Matter of Dummett	38 Misc. Rep. 477	515
Matter of East One Hundred Seventy-fifth Street	49 App. Div. 114	599
Matter of Embree	9 App. Div. 602	104
Matter of Estate of Prime	136 N. Y. 347	671
Matter of Fairchild	151 N. Y. 361	149
Matter of Feierabend	38 Misc. Rep. 524	754
Matter of Flynn	136 N. Y. 287	130
Matter of Flynn's Estate	30 N. Y. Supp. 388	772
Matter of Foster	38 Misc. Rep. 347; 77 N. Y. Supp. 922	438, 624
Matter of Freel	73 N. Y. St. Repr. 331	583
Matter of Gannon	2 Misc. Rep. 333	620
Matter of Gihon	169 N. Y. 443	124, 225
Matter of Glendinning	68 App. Div. 125; affd., 171 N. Y. 684	617
Matter of Gould	156 N. Y. 423	518
Matter of Gould Coupler Co	79 Hun, 206	709
Matter of Gray	47 App. Div. 554	264
Matter of Griffin	167 N. Y. 78	771
Matter of Guess	16 Misc. Rep. 306	583
Matter of Haight	33 Misc. Rep. 544	693
Matter of Hall	164 N. Y. 196	627
Matter of Hawkins	165 N. Y. 192	694
Matter of Hecht	71 Hun, 62	503
Matter of Hellman	77 App. Div. 355	617
Matter of Holden	126 N. Y. 589	442
Matter of Hood	98 N. Y. 363	770
Matter of Houdayer	150 N. Y. 37	134
Matter of Howell	34 Misc. Rep. 432	518
Matter of Hughes	95 N. Y. 55	763
Matter of Institute for Deaf and Dumb	121 N. Y. 234	670
Matter of James	146 N. Y. 78	92
Matter of Jones	172 N. Y. 575	523
Matter of Kahn	1 Connoly, 510	620
Matter of Kemmler	136 U. S. 448	482
Matter of Kerby-Dennis Co.	2 Am. Bank. Rep. 402	260
Matter of Kessler	163 N. Y. 208	694
Matter of Ketchum	1 Fed. Repr. 840	411
Matter of Kimberly	150 N. Y. 90	736
Matter of Klock	30 App. Div. 24	293, 487
Matter of Knoedler	140 N. Y. 377	135
Matter of Ladue	118 N. Y. 213	598
Matter of Laney	50 Hun, 15; affd., 119 N. Y. 607	515
Matter of Lange's Estate	55 N. Y. Supp. 750	74
Matter of Lapham	19 Misc. Rep. 77	620
Matter of Larner	68 App. Div. 320	379
Matter of Lockwood	2 Connoly, 118	620
Matter of Loewenstine	2 Misc. Rep. 323	620

Digitized by Google

		Page.
Matter of Macaulay	94 N. Y. 579	613
Matter of McBride	6 App. Div. 376	654
Matter of McKay	5 Misc. Rep. 123	628
Matter of Maresi	74 App. Div. 76	125, 226
Matter of Mason	4 Edw. Ch. 418	689
Matter of Mayor	97 N. Y. 572	496
Matter of Mayor	20 App. Div. 404; affd., 155 N. Y. 638	598
Matter of Mayor	40 App. Div. 452	599
Matter of Miller	110 N. Y. 223	132
Matter of Moulton v. Acconcia	59 App. Div. 27; affd., 168 N. Y. 645	692
Matter of Mueller	15 App. Div. 66	430
Matter of Myers	131 N. Y. 416	627
Matter of Newman	4 Dem. 65	436
Matter of New York & Brooklyn Bridge	72 N. Y. 527	642
Matter of Ostrander	12 Misc. Rep. 476; affd., 146 N. Y. 404	456
Matter of Otis	101 N. Y. 585	379
Matter of O'Toole v. Stewart	75 App. Div. 497	711
Matter of Pell	171 N. Y. 48; revg. 60 App. Div. 286	133
Matter of Phillips	34 Hun, 627; affd., 98 N. Y. 267	766
Matter of Phipps	77 Hun, 325; affd., 143 N. Y. 641	134
Matter of Prospect Avenue	85 Hun, 257	270
Matter of Randall	152 N. Y. 508	76, 119
Matter of Rapid Transit R. R. Commissioners	5 App. Div. 290; 23 id. 472	20, 732
Matter of Rasquin	37 Misc. Rep. 693	693
Matter of Robert	111 N. Y. 372	624
Matter of Robinson	3 Abb. Pr. 466	410
Matter of Russell	168 N. Y. 169	736
Matter of Saltus	3 Abb. Ct. App. Dec. 243	515
Matter of Schermerhorn	38 App. Div. 350	129
Matter of Scott	1 Redf. 234	225
Matter of Seebeck	140 N. Y. 241	736
Matter of Selleck	111 N. Y. 284	516
Matter of Shaughnessy v. Fornes	73 App. Div. 462; affd., 172 N. Y. 323	456
Matter of Silliman	38 Misc. Rep. 226	129
Matter of Smith	26 Abb. N. C. 56	121
Matter of Steinert	29 Hun, 301	755
Matter of Tatum	61 App. Div. 513	556
Matter of Taylor	25 Abb. N. C. 143	290
Matter of Thorp	31 Misc. Rep. 581	627
Matter of Todd	64 App. Div. 435	140
Matter of Totten	38 Misc. Rep. 349	431
Matter of Turfler's Estate	1 Misc. Rep. 58	72
Matter of Underhill	117 N. Y. 471	76
Matter of Union Trust Co.	35 Misc. Rep. 260; 70 App. Div. 5	770
Matter of Vanderbilt	50 App. Div. 246; affd., 163 N. Y. 597	138
Matter of Vanderbilt	68 App. Div. 27; 172 N. Y. 69	518
Matter of Vinot	26 N. Y. St. Repr. 610	74
Matter of Von Post	35 Misc. Rep. 367	129
Matter of Wagner	119 N. Y. 28; affg. 52 Hun, 23	479
Matter of Warner	39 App. Div. 91	484
Matter of Wells	113 N. Y. 396	736
Matter of Westurn	152 N. Y. 93	225
Matter of White	44 App. Div. 119	240
Matter of Whitehead	38 App. Div. 319	479

Digitized by Google

		Page.
Matter of Whiting	150 N. Y. 27	135
Matter of Willets	112 N. Y. 289	139
Matter of Williams	31 App. Div. 617	222
Matter of Winegard	78 Hun, 58	464
Matter of Wotton	59 App. Div. 584	627
Matter of Young	145 N. Y. 535	104
Matthews v. Matthews	53 Hun, 244	395
Maxwell v. Dow	176 U. S. 581	462
Mayor v. Law	125 N. Y. 380	733
Mayor v. N. Y. C. & H. R. R. R. Co.	69 Hun, 324	45
Mayor v. Ryan	7 Daly, 436	321
Mead v. Westchester Fire Ins. Co.	64 N. Y. 453	511
Meeks v. Meeks	34 Misc. Rep. 465	585
Meislahn v. Meislahn	56 App. Div. 566	431
Merchants' Nat. Bank v. Clark	139 N. Y. 314	575
Meriwether v. Garrett	102 U. S. 513	36
Merkee v. City of Rochester	13 Hun, 157	230
Merriam v. Hill	1 Wkly. Dig. 260	660
Merritt v. Williamson	27 App. Div. 121	248
Metcalf v. Barker	N. Y. L. J., December 23, 1902	667
Metzger v. Schnabel	23 Misc. Rep. 699	695
Michaels v. Fishel	51 App. Div. 274; affd., 169 N. Y. 381	351, 644
Milbank v. Jones	127 N. Y. 376	529
Millard v. Missouri, Kansas & Texas R. R. Co.	86 N. Y. 441	444
Miller v. Kent	59 How. Pr. 321	250
Miller v. Levi	44 N. Y. 489	348
Miller v. State	149 Ind. 607	117
Miller v. Stewart	9 Wheat. 680	8
Milligan v. Brooklyn Warehouse Co.	34 Misc. Rep. 55	328
Milliken v. Western Union Tel. Co.	110 N. Y. 403	8
Mills v. Albany Exchange Savings Bank	28 Misc. Rep. 251	99
Mills v. Stewart	41 N. Y. 384	4
Milnor v. N. Y. & N. H. R. R. Co.	53 N. Y. 363	444
Missouri v. Lewis	101 U. S. 31	462
Mitchell v. Carter	14 Hun, 448	525
Moffat v. Henderson	50 N. Y. Super. Ct. 211	516
Moffett v. Elmendorf	152 N. Y. 475	736
Monarque v. Monarque	80 N. Y. 320	736
Monegan v. People	55 N. Y. 613	497
Moody v. Pomeroy	4 Den. 115	524
Moore v. Moore	14 Wkly. Dig. 255	395
Moore v. Potter	155 N. Y. 481	313
Morgan v. Campbell	22 Wall. 381	260
Mott v. Dunn	10 How. Pr. 225	41
Mott v. Oppenheimer	135 N. Y. 312	310
Mott v. Richtmyer	57 N. Y. 49	383
Muller v. Levy	52 Hun, 123	240
Mungall v. Bursley	51 App. Div. 380	425
Murphy v. Commonwealth	172 Mass. 264	117
Murray v. Blatchford	1 Wend. 583	225
Mutual Life Ins. Co. v. Smith	23 Hun, 535	102
Myres' Case	2 Abb. Pr. 476	661

N.

Nathan v. Whitehill	67 Hun, 398	249
National Exhibition Co. v. Crane	167 N. Y. 505	107
National Protective Assn. v. Cumming	170 N. Y. 315	49
Neil v. Abel	24 Wend. 185	525

Digitized by Google

		Page.
New York County Nat. Bank v. American Surety Co	69 App. Div. 153	15
New York Life Ins. Co. v. Universal Life Ins. Co	88 N. Y. 424	135
Newhouse v. Godwin	17 Barb. 236	68
Niagara County Nat. Bank v. Lord	33 Hun, 557	42
Nicoll v. Walworth	4 Den. 385	364
Niles v. N. Y. C. & H. R. R. R. Co	69 App. Div. 144	247
Noel v. Murray	13 N. Y. 167	62
Norwood v. Baker	172 U. S. 278	294
Nutt v. Cuming	155 N. Y. 309	214

O.

O'Beirne v. Lloyd	43 N. Y. 248	747
O'Grady v. New York Mut. Live Stock Ins. Co.	16 App. Div. 567	495
Oliver v. Oliver	169 Mass. 592	117
Olivet v. Whitworth	82 Md. 258	138
O'Reilley v. City of Kingston	114 N. Y. 439	487
Orvis v. Dana	1 Abb. N. C. 268	12
Ottaway v. Lowden	55 App. Div. 410	95
Overman v. May	35 Iowa, 89	631
Overseers, etc., of Crown Point v. Warner	3 Hill, 150	691

P.

Pacific Gas Co. v. Wheelock	80 N. Y. 278	277
Palmer v. Haight	2 Barb. 210	12
Park v. Musgrave	2 T. & C. 571	715
Park & Sons Co. v. National Wholesale Druggists' Assn	30 Misc. Rep. 675; 50 N. Y. Supp. 1064	58
Parsons v. Lyman	20 N. Y. 103	763
Patchen v. Mayor	13 Wend. 664	453
Patchen v. Patchen	121 N. Y. 432	684
Paterson v. Ellis	11 Wend. 298	196
Patten v. Carley	69 App. Div. 425	667
Patterson v. Birdsall	64 N. Y. 294	183
Payfer v. Bissell	3 Hill, 239	453
Payne v. Wilson	74 N. Y. 348	180
Pease v. Eagan	131 N. Y. 262	183
Pendle v. Waite	3 Dem. 261	478
People v. Barondess	61 Hun, 571; 133 N. Y. 649	58
People v. Canal Board	55 N. Y. 390	42
People v. Chalmers	60 N. Y. 154	8
People v. Crotty	22 App. Div. 77	271
People v. Duke	19 Misc. Rep. 292	58
People v. Fuller	35 Misc. Rep. 189	439
People v. Hicks	15 Barb. 154	458
People v. Jaehne	103 N. Y. 182	495
People v. Knickerbocker Life Ins. Co.	106 N. Y. 619	278
People v. Kostka	4 N. Y. Crim. 429	52
People v. Linzey	79 Hun, 23	524
People v. Patterson	38 Misc. Rep. 79	701
People v. St. Nicholas Bank	77 Hun, 159	575
People v. Sharp	107 N. Y. 427	461
People v. Spolasco	33 Misc. Rep. 530	140
People v. Starkweather	42 N. Y. Super. Ct. 325	483
People v. Vanderbilt	26 N. Y. 287	37
People v. Wilzig	4 N. Y. Crim. 403	52

Digitized by Google

		Page.
People ex rel. American Thread Co. v. Feitner	30 Misc. Rep. 641	476
People ex rel. Armstrong Cork Co. v. Feitner	157 N. Y. 159	283
People ex rel. Bishop v. Palen	74 Hun, 289	581
People ex rel. Bradley v. State Reformatory	148 Ill. 413	117
People ex rel. Broadway Improvement Co. v. Barker	14 App. Div. 412	465
People ex rel. Bronx Gas Co. v. Feitner	43 App. Div. 198	465
People ex rel. Brooks v. Watts	73 Hun, 404	290
People ex rel. Brown v. Board of Supervisors	4 N. Y. Crim. 102	439
People ex rel. Bungart v. Wells	57 App. Div. 140	471
People ex rel. Cantwell v. Coler	61 App. Div. 598; 104 N. Y. St. Repr. 755	440
People ex rel. Clark v. State Reformatory	38 Misc. Rep. 241	701
People ex rel. Coffey v. Democratic Committee	164 N. Y. 335	725
People ex rel. Comstock v. Lucas	93 N. Y. 585	321
People ex rel. Cornell S. Co. v. Dederick	161 N. Y. 195	617
People ex rel. Crane Co. v. Feitner	49 App. Div. 108	284
People ex rel. Crummey v. Palmer	152 N. Y. 217	456
People ex rel. Deverell v. Musical Union	118 N. Y. 101	354
People ex rel. Edwards v. Warden	37 Misc. Rep. 641	593
People ex rel. Eisen v. Flynn	37 Misc. Rep. 90	592
People ex rel. Equitable Gas Light Co. v. Barker	144 N. Y. 94	468
People ex rel. Fahy v. York	49 App. Div. 173	168
People ex rel. Fleischman v. Fox	34 Misc. Rep. 82	471
People ex rel. Frank v. Keeper	38 Misc. Rep. 233	701
People ex rel. German Looking Glass Co. v. Barker	75 Hun, 6	470
People ex rel. Gill v. Walsh	15 N. Y. St. Repr. 17	58
People ex rel. Hackley v. Kelly	24 N. Y. 74	460
People ex rel. Howlett v. Mayor	63 N. Y. 291	487
People ex rel. Huntington v. Crennan	141 N. Y. 239	495
People ex rel. Kellogg v. Schuyler	4 N. Y. 173	321
People ex rel. Kenney v. Cornell	6 Misc. Rep. 568	458
People ex rel. Kingsland v. Palmer	52 N. Y. 83	497
People ex rel. Laird v. Hannah	92 Hun, 476; 37 N. Y. Supp. 703	458
People ex rel. Lemmon v. Feitner	167 N. Y. 1	411
People ex rel. Maloney v. Edwards	56 Hun, 377	497
People ex rel. Mason v. McClave	99 N. Y. 83	496
People ex rel. Mayor v. Nichols	79 N. Y. 582	398
People ex rel. Meyer v. Roosevelt	23 App. Div. 514; affd., 155 N. Y. 702	451
People ex rel. Morris v. Randall	73 N. Y. 416	662
People ex rel. Negus v. Dwyer	90 N. Y. 407	111
People ex rel. N. Y. L. & I. Co. v. Roberts	157 N. Y. 70	482
People ex rel. N. Y. & N. J. Tel. Co. v. Neff	15 App. Div. 8	464
People ex rel. Oakwood Cemetery Assn. v. City of Syracuse	59 App. Div. 616; affd., 168 N. Y. 644	293
People ex rel. Olcott v. House of Refuge	22 App. Div. 254	496

Digitized by Google

		Page.
People ex rel. Parker Mills v. Commissioners	23 N. Y. 242	283
People ex rel. Powder Co. v. Feitner	41 App. Div. 544	130
People ex rel. Ransom v. Supervisors	78 N. Y. 622	439
People ex rel. Sears v. Tobey	153 N. Y. 381	456
People ex rel. Sherwin Williams Co. v. Barker	5 App. Div. 246; affd., 149 N. Y. 623	283
People ex rel. Smith v. State Reformatory	38 Misc. Rep. 243	701
People ex rel. Stiner v. Morrison	78 N. Y. 84	496
People ex rel. Sutphen v. Feitner	45 App. Div. 542	465, 475
People ex rel. Taylor v. Forbes	143 N. Y. 219	461
People ex rel. Thomson v. Feitner	168 N. Y. 441	465, 603
People ex rel. Van Houton v. Sadler	97 N. Y. 146	702
People ex rel. Western Union Tel. Co. v. Tierney	57 Hun, 357	464
Perryman's Case	3 Rep. 84	274
Pierson v. Hoag	47 Barb. 243	313
Pinckney v. Hegeman	53 N. Y. 31	752
Piper v. Hoard	19 N. Y. St. Repr. 303	219
Pitcher v. Hennessey	48 N. Y. 415	384
Plant v. Woods	176 Mass. 492	54
Plunkett v. Appleton	51 How. Pr. 469	525
Poillon v. Martin	1 Sandf. Ch. 569	368
Polhemus v. Fitchburg R. R. Co	123 N. Y. 502	495
Post v. Weil	115 N. Y. 361	508
Pots v. Herman	7 Misc. Rep. 4; 27 N. Y. Supp. 330	249, 307
Potter v. Boyce	73 App. Div. 383	598
Potter v. Low	16 How. Pr. 549	660
Poughkeepsie, etc., Plank Road v. Griffin	21 N. Y. 150	84
Powell v. Waldron	89 N. Y. 328	411
Pray v. Hegeman	92 N. Y. 508	413
Price v. Holman	135 N. Y. 124	627
Pronk v. Brooklyn H. R. R. Co	68 App. Div. 390	60
Pruyne v. Adams, F. & M. Co	92 Hun, 214	181
Pumpelly v. Phelps	40 N. Y. 66	188
Putnam v. Lincoln Safe Deposit Co.	34 Misc. Rep. 333; 66 App. Div. 136	739

Q.

Quee Drug Co. v. Plaut	55 App. Div. 87	588

R.

Ranger v. Thalmann	65 App. Div. 5	422
Rankine v. Elliott	16 N. Y. 377; affg. 14 How. Pr. 339	5
Rapalee v. Stewart	27 N. Y. 310	184
Raven v. Smith	71 Hun, 197; 87 id. 90	709
Raynor v. Lyon	46 Hun, 227	507
Read v. Bank of Attica	124 N. Y. 671	62
Read v. Marine Bank	136 N. Y. 454	99
Reilly v. Sicilian Asphalt Paving Co.	170 N. Y. 40	112
Relfe v. Rundle	103 U. S. 222	276
Remington Paper Co. v. London Assurance Co.	12 App. Div. 218	90
Remmel v. Townsend	83 Hun, 353	423

Digitized by Google

		Page.
Rensselaer & Saratoga R. R. Co. v. Davis	55 N. Y. 145	442
Reubens v. Joel	13 N. Y. 488	41
Reynolds v. Denslow	80 Hun, 359	414
Reynolds v. Mayor, Lane & Co.	39 App. Div. 218	537
Reynolds v. Reynolds	33 App. Div. 625	396
Rice v. Rice	22 Wkly. Dig. 258	395
Richmond v. Prain	24 Hun, 579	750
Richtmyer v. Richtmyer	50 Barb. 55	640
Riedeman v. Mount Morris Electric Light Co.	56 App. Div. 23	721
Riggs v. American Tract Society	95 N. Y. 503	620
Riggs v. Palmer	115 N. Y. 506	495
Rinchey v. Stryker	28 N. Y. 45	43
Ritch v. Hawxhurst	114 N. Y. 512	625
Ritchie v. McMullen	79 Fed. Repr. 522	242
Ritterband v. Baggett	4 Abb. N. C. 67	411
Ritzler v. Raether	10 Daly, 286	344
Riverside Bank v. Woodhaven Junc. Land Co.	34 App. Div. 359	575
Robert v. Sadler	104 N. Y. 229	631
Roberts v. A. & W. S. R. R. Co.	25 Barb. 662	666
Robertson v. McCarty	54 App. Div. 103	431
Rochester Distilling Co. v. Devendorf	72 Hun, 428	423
Rodgers v. Adriatic Fire Ins. Co.	87 Hun, 384	278
Rodgers v. Clement	162 N. Y. 428	634
Rogers v. Evarts	17 N. Y. Supp. 264	53
Rogers v. Murdock	45 Hun, 30; 9 N. Y. St. Repr. 660.	624, 676
Rogers v. Rogers	111 N. Y. 228	771
Roome v. Swan	15 Civ. Pro. 344	411
Roosa v. Harrington	171 N. Y. 349	408
Rosenbaum v. Rice	36 Misc. Rep. 410	249
Ross v. Ross	31 Hun, 140	395
Rothmiller v. Stein	143 N. Y. 581	242
Rourke v. Elk Drug Co.	75 App. Div. 145	51
Rowell v. Janvrin	151 N. Y. 69	272
Royce v. Adams	123 N. Y. 402	503
Russell v. Winne	37 N. Y. 591	263
Ryerson v. Ryerson	55 Hun, 191	395

S.

Sage v. Chollar	21 Barb. 596	387
Sage v. Culver	147 N. Y. 241	247
St. John v. Buckley	39 App. Div. 629	248
St. Vincent Asylum v. City of Troy	76 N. Y. 108	36
Salisbury v. Andrews	128 Mass. 336	161
Sanders v. Soutter	54 Hun, 310	425
Savage v. Burnham	17 N. Y. 561	736
Scallan v. Brooks	54 App. Div. 248	431
Schenck v. Naylor	2 Duer, 675	23
Schillinger Cement Co. v. Arnott	152 N. Y. 584	399
Schmerber v. Reinach	38 App. Div. 622	240
Schmitz v. Langhaar	88 N. Y. 503	609
Schroeter v. Schroeter	23 Hun, 230	395
Schutz v. Morette	146 N. Y. 137	540, 609
Seamen's Friend Society v. Hopper	33 N. Y. 624	620
Segelken v. Meyer	94 N. Y. 473	713
Shaw v. Broadbent	129 N. Y. 114	749
Sheldon v. Edwards	35 N. Y. 279	180
Sheldon v. Wickham	161 N. Y. 500	42

Digitized by Google

		Page.
Shepard v. Merrill	13 Johns. 475	12
Shepard v. Patterson	3 Dem. 183	628
Shepard v. Saltus	4 Redf. 232	225
Sherman v. Beacon Construction Co.	58 Hun, 143	249
Sherman v. McIntyre	7 Hun, 592	540
Shimmel v. Morse	30 Misc. Rep. 257	365
Sinsheimer v. United Garment Workers	77 Hun, 215	58
Skeel v. Spraker	8 Paige, 182	182
Smith v. Bell	6 Pet. 68	92
Smith v. Coe	170 N. Y. 167	546, 634
Smith v. Cornell	111 N. Y. 554	125
Smith v. Fleischman	23 App. Div. 358	709
Smith v. Furbish	68 N. H. 123	46
Smith v. Janes	20 Wend. 192	575
Smith v. People	47 N. Y. 330	497
Smith v. Roberts	91 N. Y. 470	180
Smith v. Second Nat. Bank	169 N. Y. 467	763
Smith v. Smith	7 Misc. Rep. 305; 37 N. Y. St. Repr. 267	394
Smith v. Tracy	36 N. Y. 79	538
Snead v. Bonnoil	166 N. Y. 325	550
Snedeker v. Congdon	41 App. Div. 433	503
Snelling v. McIntyre	6 Abb. N. C. 469	183
Snyder v. Andrews	6 Barb. 43	12
Soper v. St. Regis Paper Co.	76 App. Div. 409	634
Southard v. Benner	72 N. Y. 424	42, 263
Southgate v. Continental Trust Co.	74 App. Div. 150	759
Southport Plank Road Co. v. Russell	7 N. Y. St. Repr. 597	407
Spelman v. Freedman	130 N. Y. 421	17
State v. Bartlett	68 Mo. 581	542
State v. Newell	1 Mo. 248	663
State v. Toomer	7 Rich. L. 216	290
State v. Wilson	43 N. H. 415	146
State ex rel. Atty.-Gen. v. Peters	43 Ohio St. 629	117
State of Nebraska ex rel. Berge v. Lansing	35 L. R. A. 124	290
State of Washington ex rel. Lysons v. Ruff	16 L. R. A. 140	290
Staten Island M. R. R. Co. v. Hinchcliffe	34 Misc. Rep. 624; 170 N. Y. 481.	529 545
Steinway v. Von Bernuth	59 App. Div. 261	586
Stenton v. Jerome	54 N. Y. 480	715
Stephens v. Fox	83 N. Y. 313	4
Stephens v. Perrine	143 N. Y. 476	554
Stevens v. Buffalo & N. Y. C. R. R. Co.	31 Barb. 590	553
Stevens v. Stevens	54 Hun, 490	392
Stevenson v. Lesley	70 N. Y. 512	736
Stewart v. Foster	1 Hilt. 505	660
Stiles v. Comstock	9 How. Pr. 48	12
Stilwell v. Carpenter	59 N. Y. 414	76
Stoddard v. Lum	159 N. Y. 265	4
Strong v. Harris	84 Hun, 314	585
Strubbe v. Kings County Trust Co.	60 App. Div. 548	7
Sturgis v. Coleman	38 Misc. Rep. 302	332
Suburban R. T. Co. v. Mayor	128 N. Y. 510	495
Sullivan v. Traders' Insurance Co.	169 N. Y. 213	90
Sun Printing & Pub. Assn. v. Delaney	48 App. Div. 623	58

T.

Talbot v. Doran & Wright Co.	16 Daly, 174	250
Talcott v. Wabash R. R. Co.	159 N. Y. 461	443

Digitized by Google

		Page.
Taylor v. Betsford	13 Johns. 487	524
Taylor v. Monnot	4 Duer, 116	692
Teed v. Morton	60 N. Y. 502	686
Teller v. Randall	40 Barb. 242	409
Terry v. Moore	12 App. Div. 396	219
Thayer v. Thayer	101 Mass. 111	394
Thompson v. Brown	4 Johns. Ch. 620	225
Thompson v. Carmichael	3 Sandf. Ch. 127	72
Thomson v. Taylor	71 N. Y. 217	610
Thomson v. Thomson	1 Bradf. 24	479, 515
Tilden v. Aitken	37 App. Div. 28	305
Tilden v. Green	130 N. Y. 29	362
Tolles v. Wood	16 Abb. N. C. 1	660
Tooley v. Dibble	2 Hill, 641	274
Town of Palatine v. Kreuger	121 Ill. 72	631
Townshend v. Frommer	125 N. Y. 446	414
Treadwell v. Abrams	19 How. Pr. 219	540
Tremaine v. Mortimer	128 N. Y. 1	554
Tripp v. Childs	14 Barb. 85	660
Troy & Boston R. R. Co. v. Tibbits	18 Barb. 297	84
Trustees of Columbia College v. Lynch	70 N. Y. 440	310, 507
Tucker v. Tucker	5 N. Y. 408	362
Tuthill v. Tracy	31 N. Y. 157	213
Tyroler v. Gummersbach	28 Misc. Rep. 151	319
Tyrrell v. Bank of London	10 H. L. Cas. 26	368

U.

Uhlmann v. Uhlmann	17 Abb. N. C. 236	395
Underwood v. Curtis	127 N. Y. 523	362
United States Trust Co. v. Bixby	2 Dem. 494	628
Usher v. Van Vranken	48 App. Div. 416	715

V.

Valentine v. Kelly	26 N. Y. St. Repr. 481	524
Valentine v. Wetherill	31 Barb. 655	420
Van Axte v. Fisher	117 N. Y. 403	408
Van Brocklen v. Smeallie	140 N. Y. 70	312
Van Cott v. Prentice	104 N. Y. 45	97
Van Epps v. Van Epps	6 Barb. 320	393
Van Pelt v. Van Pelt	30 Barb. 134	66
Veerhoff v. Miller	30 App. Div. 355	257
Vegelahn v. Guntner	167 Mass. 92	54
Verplanck v. De Went	10 Hun, 611	625
Vincent v. Newhouse	83 N. Y. 505	685
Voorhees v. Voorhees	39 N. Y. 463	717
Vosburgh v. Diefendorf	119 N. Y. 357	573

W.

Wager v. Wager	89 N. Y. 161	585
Wait v. Borne	123 N. Y. 592	537
Waite v. Dowley	94 U. S. 527	357
Walrod v. Ball	9 Barb. 271; 6 B. Mon. 116	336
Walsh v. Fitchburg R. R. Co	145 N. Y. 301	85
Walsham v. Stainton	1 De G., J. & S. 678	242
Walton v. Coe	110 N. Y. 109	639
Ward v. Ward	105 N. Y. 68	405
Wardell v. Howell	9 Wend. 170	573
Washington v. Bank for Savings	171 N. Y. 166	430
Watertown Bank & Loan Co. v. Mix	51 N. Y. 558	525

Digitized by Google

		Page.
Watts v. Adler	130 N. Y. 648	268
Wayland v. Tysen	45 N. Y. 281	545
Webb v. Overmann	6 Abb. Pr. 92	661
Webb v. Van Zandt	16 Abb. Pr. 190	708
Weiss v. Mendelson	24 Misc. Rep. 692	344
Wetmore v. Bruce	118 N. Y. 322	507
Wetmore v. Wetmore	149 N. Y. 521	276
Wheeler v. Clutterbuck	52 N. Y. 67	419
Wheeler v. Lawson	103 N. Y. 40	555
Wheeler v. Sweet	137 N. Y. 438	526
White's Bank of Buffalo v. Nichols	64 N. Y. 65	633
Whiting v. Mayor	37 N. Y. 600	219
Whitman v. Keiley	58 App. Div. 92	250
Whitney Arms Co. v. Barlow	63 N. Y. 62	588
Wiggins v. Downer	67 How. Pr. 65	525
Wildey v. Robinson	85 Hun, 362	503
Williams v. Brown	53 App. Div. 486	577
Williams v. Lande	74 Hun, 425	362
Williams v. Merle	11 Wend. 80	326
Williams v. Sherman	7 Wend. 109	257
Williams v. Williams	8 N. Y. 538	414
Willis v. Mott	36 N. Y. 486	766
Willis v. Smyth	91 N. Y. 297	430
Willis v. Warren	1 Hilt. 590	330
Wilmerding v. McKesson	103 N. Y. 329	627
Wilson v. City of Watertown	3 Hun, 508	631
Wilson v. Deen	74 N. Y. 531	89
Wilson v. Little	2 N. Y. 443	715
Wilson v. Wightman	36 App. Div. 41	287
Windmuller v. Pope	107 N. Y. 675	529
Winne v. Winne	166 N. Y. 263	217
Wintermute v. Clarke	5 Sandf. 242	692
Wood v. Furtick	17 Misc. Rep. 562	502
Wood v. Tunnicliff	74 N. Y. 38	225
Woodman v. Goodenough	18 Abb. Pr. 265	660
Woodruff v. Woodruff	17 Abb. Pr. 165	514
Worthington v. London Guarantee & Accident Co.	164 N. Y. 81	320
Wright v. Wright	54 N. Y. 437	99
Wyckoff v. Southern Hotel Co	24 Mo. App. 382	328

Y.

Yonkers Gazette Co. v. Taylor	30 App. Div. 334	82
Young v. Young	80 N. Y. 438	679

UNITED STATES REVISED STATUTES CITED.

	Page.
U. S. Rev. Stat., § 5139	357

NEW YORK STATE CONSTITUTION CITED.

Page.		Page.
Constitution of 1777	33	State Const., art. XIII	580
State Const., art. I, § 6	460	

Digitized by Google

NEW YORK REVISED STATUTES CITED.

	Page.
R. S., pt. 2, chap. 6, tit. 5, § 18	611
R. S., pt. 3, chap. 8, tit. 4, art. 3, § 67	5
R. S., pt. 3, chap. 8, tit. 4, art. 3, § 69	5
R. S., pt. 3, chap. 8, tit. 4, art. 3, § 79	5
R. S., pt. 5, chap. 3, tit. 2	113
1 R. S. 726, § 37	362
1 R. S. 726, § 38	362
1 R. S. 727, § 44	737
1 R. S. 730, § 63	403
1 R. S. 738, § 137	144
1 R. S. 753	420
2 R. S. 55, § 27	612
2 R. S. 63, § 40	766
2 R. S. 116, § 18	611
2 R. S. 136, § 5	43
2 R. S., chap. 6, tit. 3, art. 2, § 34, m. p. 88	613

EIGHTH EDITION CITED.

	Page.
3 R. S. 1978	83

SESSION LAWS CITED.

Laws of	Page.
1787, chap. 44	144
1798, chap. 80	36, 46
1801, chap. 129	46
1807, chap. 115	33
1813, chap. 86	46
1826, chap. 58	34, 45
1833, chap. 11	703
1833, chap. 279	43
1837, chap. 182	34
1845, chap. 225	34
1847, chap. 80	764
1848, chap. 40	4
1852, chap. 285	45, 729
1857, chap. 763	44
1860, chap. 368	46
1860, chap. 446	324
1860, chap. 508	702
1870, chap. 283	373
1870, chap. 383	34
1871, chap. 381	671
1871, chap. 383	670
1871, chap. 574	34, 671
1873, chap. 335	373
1875, chap. 611	83
1876, chap. 319	324
1880, chap. 513	94
1882, chap. 409	303
1882, chap. 410	341, 346, 373, 589, 599, 670, 761
1886, chap. 353	590
1887, chap. 697	46
1888, chap. 57	764
1889, chap. 382	114
1889, chap. 487	17
1890, chap. 563	83, 639
1890, chap. 564	639
1890, chap. 565	2
1890, chap. 567	83, 639
1890, chap. 569	288
1892, chap. 399	481
1892, chap. 401	692
1892, chap. 602	94
1892, chap. 687	282
1892, chap. 688	356
1892, chap. 689	303
1893, chap. 100	764
1893, chap. 452	403
1893, chap. 586	764
1893, chap. 660	600
1893, chap. 686	140
1894, chap. 253	325
1894, chap. 307	484
1894, chap. 740	18
1895, chap. 394	294
1895, chap. 663	328
1895, chap. 884	325
1896, chap. 112. 355, 637, 642, 647, 691	
1896, chap. 547. 145, 273, 362, 403, 415	
1896, chap. 748	341
1896, chap. 908	131, 148, 468, 482, 519, 617, 772
1896, chap. 1000	317
1897, chap. 284	131, 138, 519
1897, chap. 378	167, 253, 318, 331, 370, 455, 464, 475, 590, 600, 701

Digitized by Google

Laws of	Page.
1897, chap. 414	231, 485
1897, chap. 417	16, 264, 403, 415
1897, chap. 418	257, 325
1897, chap. 419	398
1897, chap. 427	439
1897, chap. 612	99, 573
1898, chap. 88	522
1899, chap. 76	132, 517
1899, chap. 375	233
1899, chap. 380	326
1899, chap. 473	725
1899, chap. 712	475
1899, chap. 737	482
1901, chap. 128	93
1901, chap. 173	132
1901, chap. 260	114
1901, chap. 334	592
1901, chap. 354	3
1901, chap. 425	113
1901, chap. 466	370, 592, 603, 701, 710
1901, chap. 524	520
1901, chap. 640	558, 637, 642, 647, 692
1902, chap. 282	113
1902, chap. 496	132
1902, chap. 528	40
1902, chap. 559	489
1902, chap. 580	341, 346

CODE OF CIVIL PROCEDURE CITED.

Code Civ. Pro.,	Page.
§ 66	106
§ 158	750
§ 171	219
§ 219	41
§ 376	484
§ 382	482, 484
§ 388	384
§ 416	668
§ 452	280
§ 454	640
§ 484	112
§ 488	640, 708
§ 494	545
§ 495	547
§ 497	219
§ 500	545, 635
§ 502	576
§ 507	635
§ 519	529
§ 531	424
§ 537	545
§ 544	212
§ 545	547, 548
§ 603	41, 285
§ 604	41
§ 636	43
§ 649	135, 663
§ 657	663
§ 658	663
§ 713	718
§ 765	276
§ 780	580
§ 829	744
§ 831	392
§ 856	459
§ 872	247
§ 1229	394
§ 1268	750
§ 1420	664
§ 1537	364
§ 1638	44
Code Civ. Pro., § 1691	345
§ 1726	345
§ 1730	345
§ 1822	75, 437
§ 1826	613
§ 1850	44
§ 1865	717
§ 1869	718
§ 1909	100
§ 1917	99
§ 2125	603
§ 2131	452
§ 2140	450
§ 2185	752
§ 2250	441
§ 2253	350
§ 2285	111
§ 2286	754
§ 2395	214
§ 2471a	288
§ 2472	479, 612
§ 2474	228
§ 2514	479
§ 2516	227
§ 2517	227
§ 2520	227
§ 2522	228
§ 2524	228
§ 2525	228
§ 2528	228
§ 2561	120
§ 2562	120
§ 2600	520
§ 2601	520
§ 2623	66
§ 2713	220
§ 2716	479
§ 2717	764
§ 2718	75, 608, 613
§ 2719	608, 764
§ 2722	605, 612

Digitized by Google

		Page.			Page.
Code Civ Pro.,	§ 2726	521, 610	Code Civ Pro.,	§ 2811	140
	§ 2727	521		§ 3017	484
	§ 2728	227		§ 3053	341
	§ 2730	140		§ 3056	341
	§ 2731	437, 514		§ 3076	442
	§ 2733	72, 140		§ 3228	398
	§ 2734	140		§ 3229	398
	§ 2736	139		§ 3240	441
	§ 2741	140		§ 3253	442
	§ 2743	75		§ 3268	638
	§ 2802	140		§§ 3398–3419	398

CODE OF PROCEDURE CITED.

		Page.
Code of Pro.,	§ 219	42

CODE OF CRIMINAL PROCEDURE CITED.

		Page.			Page.
Code of Crim. Pro.,	§ 145	458	Code of Crim. Pro.,	§ 608	459
	§ 148	458, 471		§ 608	459
	§ 308	439		§ 887	702
	§ 309	439		§ 899	702
				§ 915	110

PENAL CODE CITED.

		Page.			Page.
Penal Code,	§ 41w	579	Penal Code,	§ 640d	93
	§ 41x	579		§ 680	459
	§ 143	459		§ 687a	113
	§ 342	460			

GENERAL RULES OF PRACTICE CITED.

	Page.		Page.
General Rules of Practice, rule 37.	580	General Rules of Practice, rule 82.	241, 247

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THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK.

COMMENCING OCTOBER, 1902.

THE PEOPLE ex rel. THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., Relator, *v.* THE BOARD OF RAILROAD COMMISSIONERS, Defendant.

(Supreme Court, Albany Special Term, October, 1902.)

Railroad law — Contents of return of board of railroad commissioners to a certiorari to review their certificate that public convenience requires a proposed railroad.

Upon a review by certiorari of a certificate of the state board of railroad commissioners that public convenience and a necessity require the construction of a proposed railroad, the board need not return any statements made to it upon the application for the certificate as to the financial ability of the promoters of the proposed railroad or as to the good faith of the enterprise, and this although the board has a standing rule requiring applicants to make such proof.

MOTION to modify a writ of certiorari.

Henry W. Taft, for relator.

John C. Davies, Attorney-General, for defendant.

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CHESTER, J. The Railroad Law (L. 1890, ch. 565), section 59, provides that "no railroad corporation hereafter formed * * * shall exercise the powers conferred by law upon such corporations or begin the construction of its road * * * until the board of railroad commissioners shall certify * * * that public convenience and a necessity require the construction of said railroad." The board of railroad commissioners have so certified with respect to the proposed road of the New York & Portchester Railroad Company, running part of the way side by side and all of the way not more than about two miles from the Harlem River and Portchester Railroad, which is leased to and operated by the relator.

The relator has sued out a writ of certiorari to review the action of the board in granting such certificate, and the board has made this motion for an order modifying the writ so as not to require it to make return of any statements made to it in executive session with respect to the financial backing of the New York & Portchester Railroad Company or its financial ability to build such road.

The only purpose of the writ is to permit the relator to have reviewed the correctness of the conclusion of the board that public convenience and a necessity require the construction of the proposed railroad. To that end all evidence before the board upon which it acted and which was material to the determination of those questions should be returned. But no statements made to the board, either in executive or open session, as to the financial ability of the promoters to build the road or as to the *bona fides* of the enterprise, can have any relation to or bearing upon either the question of public convenience or the question of the necessity for the road. Those are entirely different questions, and for their determination the board could not properly consider any evidence, statements or information as to the financial condition or good faith of the applicant.

The fact that the board has made a standing rule relating to applicants for a certificate of this character, requiring them to make proof before it of the *bona fides* of the enterprise and of the financial ability of the projectors to build the road, cannot alter or affect the question. The rule may be a proper one to aid the board in the discharge of a public duty, yet under the law the only questions for it to pass upon are the questions of public con-

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venience and necessity, and in order to review under this writ the correctness of its determination it is not essential that it should be required to make return of matters which are entirely foreign to those questions. The motion is granted.

Motion granted.

MARGARET LANG, Plaintiff, *v.* JOHN C. LUTZ, GEORGE J. LUTZ et al., Defendants.

(Supreme Court, Erie Special Term, October, 1902.)

Stock Corporation Law — Liability of stockholders to creditors, how modified by and how enforced under L. 1901, ch. 354.

Where an insolvent domestic stock corporation has been voluntarily dissolved, a permanent receiver thereof appointed, and creditors restrained from suing it, a creditor thereof cannot himself later enforce the liability of stockholders to creditors as established by the Stock Corporation Law (L. 1892, ch. 688, § 54, as amd. L. 1901, ch. 354) and therein declared to be an amount equal to the amount unpaid on the stock of the stockholder for debts of the corporation contracted while he held the stock, and this because the said liability passes to the receiver as an asset of the corporation and the creditor cannot sue upon it unless the receiver will not.

This liability, as it existed before the said amendment of 1901, enured to the benefit of creditors, was not an asset of the corporation, did not pass to a receiver, and he could not enforce it.

DEMURRER of defendants Lutz to complaint.

Lyndon D. Wood, for plaintiff.

Charles F. Tabor, for defendants.

KENEFICK, J. This action is brought by a creditor of an insolvent domestic corporation against six of its stockholders, to enforce their liability under section 54 of the Stock Corporation Law, as amended by chapter 354 of the Laws of 1901. That section, so far as it is applicable here, reads: "Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors, to an amount equal to the amount

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unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him."

Prior to the amendment that section read: "The stockholders of every stock corporation shall jointly and severally be personally liable to its creditors to an amount equal to the amount of stock held by them respectively for every debt of the corporation until the whole amount of its capital stock issued and outstanding at the time such debt was incurred shall have been fully paid in."

A comparison of the original and of the amended provision readily discloses that a radical change has been effected in the liability of stockholders for corporate debts. The liability under the original section was statutory in the sense that without the statute no such liability existed. It inured to the benefit, not of the corporation, but of such of the creditors as fell within the prescribed conditions. It was not an asset of the corporation, did not pass to a receiver and could not be enforced by him. Such was the construction given to a somewhat similar provision of the General Manufacturing Act (Laws of 1848, chap. 40) in the case of Farnsworth v. Wood, 91 N. Y. 308.

The amended section imposes no obligation upon the stockholder which did not exist without it.

The amount unpaid upon his stock is a debt which the delinquent stockholder owes the corporation and which the corporation or its legal representative can enforce (Stoddard v. Lum, 159 N. Y. 265) or which could be enforced by a bill in equity filed by a creditor in behalf of all the creditors against the corporation and all the delinquent stockholders. Mann v. Pentz, 3 N. Y. 415.

A like provision in the General Railroad Act of 1850 was considered in the case of Stephens v. Fox, 83 N. Y. 313. There the court says (p. 316): "The liability of the stockholder is not created or enlarged by statute. It rests upon no contract with the corporation, and the creditor is simply subrogated to the claim of the corporation against its debtor, in case he avails himself of his right under the statute to pursue the stockholder as such debtor to the corporation. A payment by the stockholder to the creditor, upon a recovery by him under the statute, will discharge the stockholder *pro tanto* from his indebtedness to the corporation." The same doctrine was laid down in the earlier case of Mills v. Stewart, 41 N. Y. 384.

The amended section therefore but recognizes a pre-existing lia-

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bility upon the part of the delinquent stockholder and confers upon the creditor a new remedy to enforce it.

With a clear understanding of the force of the statute under which this action is instituted, the solution of the question presented by this demurrer is not difficult. The demurrer challenges the right of the creditor to maintain this action after final judgment has been rendered, in proceedings for voluntary dissolution, dissolving the corporation, appointing a permanent receiver thereof and restraining the creditors from instituting or prosecuting any action against it.

The effect of the voluntary dissolution of the corporation was to place all its property and assets *in custodia legis* to be collected and applied by a person to be appointed by the court. The indebtedness of the stockholders upon their stock being an asset of the corporation passed to the receiver, who became trustee of the insolvent estate for the benefit of the creditors and stockholders. R. S., pt. 3, chap. 8, tit. 4, art. 3, § 67.

The receiver is required to immediately proceed to recover the amounts so unpaid upon stock and is authorized to institute an action either at law or in equity to enforce a recovery. Id., § 69.

It is also his duty to distribute the property of the corporation among its creditors in proportion to their debts, giving a preference only to those who are entitled thereto by the laws of the United State and to those having a lien on real estate. Id., § 79.

This action seeks to lay hold of a corporate asset which has already passed to the receiver, collect it and appropriate the proceeds to the payment of the claim of a single creditor. If permitted the creditor obtains a preference and the equal distribution of the insolvent estate between all the creditors which the law contemplates is defeated.

The final judgment in the dissolution proceeding enjoins any creditor from instituting or prosecuting any action against it for the recovery of a sum of money. While this action is nominally against the stockholders it is in effect against the corporation, because it seeks to collect a corporate asset to satisfy a corporate debt, and it therefore falls within the purview of the restraining decree.

The considerations here set forth are insuperable objections to the maintenance of this action. Rankine v. Elliott, 16 N. Y. 377, affg. 14 How. Pr. 339.

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The creditor is not without redress. He may call upon the rereceiver to institute the action and in case of the latter's unreasonable neglect or refusal to do so it may be prosecuted by the creditor in behalf of all the creditors, making the receiver a party defendant. Fisher v. Andrews, 37 Hun, 176; Greaves v. Gouge, 69 N. Y. 154; Brinckerhoff v. Bostwick, 88 id. 52–59. The demurrer is sustained, with costs.

Demurrer sustained, with costs.

CHARLES A. KEENE, Plaintiff, *v.* THE NEWARK WATCH CASE MATERIAL CO., Defendant.

(Supreme Court, New York Special Term, October, 1902.)

Action by creditor against surety — When not premature — Demurrer to amended complaint — Construction of surety's obligation.

Where the defendant is surety by bond to a creditor of the principal for the performance of the latter's contract with the creditor, running from May 8, 1901, to Jan. 1, 1902, and providing for an accounting by the principal at any and all reasonable times, and the defendant further covenants to discharge the obligation nominated in the bond at the "termination" of the principal's contract, an amended complaint of the creditor, served in an action begun by him against the surety on May 22, 1902, is not demurrable where, after setting up the above facts and alleging that on Sept. 1, 1901, an accounting was had by the plaintiff with the principal and a deficiency found, it further alleges that the defendant has not complied with the plaintiff's demand of payment or met the obligations of the bond, has not made good the plaintiff's said loss or paid it on request, and that the plaintiff is "now" suffering a loss in a sum named, because of the defendant's default as surety upon the bond.

A surety has a right to have its contract construed strictly.

DEMURRER to amended complaint.

Frank I. Tierney, for plaintiff.

B. F. Edsall, for defendant.

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GILDERSLEEVE, J. This is a demurrer to an amended complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The amended complaint sets up the following allegations, viz.: That the plaintiff entered into a contract with the Camm Watch Case Company, by which the latter was to make watch cases for plaintiff. That the plaintiff was to supply the gold material for such cases, but the title to the gold was to remain in plaintiff, and the Camm Company was to account, at any and all reasonable times, during the contract or at its termination, to the plaintiff for such gold and return the same either in the form of watch cases or in the original gold to the plaintiff, and make good any deficiency. That this contract was to exist from May 8, 1901, to January 1, 1902. That the plaintiff supplied the gold and the Camm Company continued to make the cases, until September 1, 1901, when an accounting was had, and a deficiency discovered in the gold account, for which the Camm Company became liable to the plaintiff, and which it has failed to make good, although called upon to do so by the plaintiff. That at the time of the making of the contract, to wit, the 8th of May, 1901, defendant became surety on a bond to guarantee the proper accounting for the gold by the Camm Company, and the due payment of any deficiency. That the consideration for this bond was the purchase of the necessary gold by plaintiff from defendant, which condition plaintiff has fulfilled. That payment has been duly demanded by plaintiff of defendant, and refused by the latter. This action is brought on this bond to recover from defendant, as surety, the deficiency in the gold account, owing by the Camm Company to plaintiff. The demurrer must be deemed to concede the truth of all the material allegations of fact of the amended complaint. Kain v. Larkin, 141 N. Y. 144, 150; Strubbe v. Kings County Trust Co., 60 App. Div. 548. The demurrer, however, is not deemed to admit as correct the legal conclusions or interpretations set up in the amended complaint. Masterson v. Townshend, 123 N. Y. 458, 461; Bonnell v. Griswold, 62 id. 294; Bogardus v. New York Life Ins. Co., 101 id. 328. In construing the complaint, the rule is that the complaint on demurrer will be deemed to allege that which can be implied from the allegations therein by a reasonable and fair intendment, and a reasonable construction will be given, although the facts are imperfectly or informally

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averred and argumentatively stated, or the pleading lacks definiteness and precision. Milliken v. Western Union Tel. Co., 110 N. Y. 403. A demurrer, on the ground here urged, can only be sustained where it appears that, after admitting all the facts alleged, or that can be by reasonable and fair intendment implied from the facts as alleged, the complaint fails to state a cause of action. Marie v. Garrison, 83 N. Y. 14. The defendant, as we have seen, is sued as surety. Suretyship, as defined by the American and English Encyclopædia of Law, is an undertaking to answer for the debt or miscarriage of another, by which the surety becomes bound as the principal or original debtor is bound. It is a primary obligation, and the creditor is not required to proceed first against the principal before he can recover from the surety. The surety and the principal may be joined as defendants in one suit, or the surety may be sued alone, without any efforts having been made to recover the debt from the principal. 24 Am. & Eng. Ency. of Law, 716. However, a guarantor is bound only by the strict letter of the contract of the principal, whose performance he has guaranteed; and the obligation of the surety is strictly construed, and is not to be extended beyond the precise terms of the contract. Brandt Surety., § 79, p. 7; Burge Surety., 40–42. The rule is well settled that sureties can only be charged when the case is brought within the very terms of their contract. They are bound to the extent of, and in the manner pointed out in, the obligation, and no further. It is not sufficient that they may sustain no injury by a change of the contract, or that it may even be for their benefit. They have a right to stand upon the very terms of their contract, and if they do not assent to any variation of it, and a variation is made, it is fatal. Miller v. Stewart, 9 Wheat. 680; Antisdel v. Williamson, 165 N. Y. 375. They can limit their liability as to time, amount, or parties, by the terms of the contract, and, if any such limitation be disregarded by the party who claims under it, the guarantor or surety is not bound. Evansville National Bank v. Kaufmann, 93 N. Y. 279; People v. Chalmers, 60 id. 154, 158. Applying the foregoing principles of law to the case at bar, it becomes of first importance to ascertain exactly what liability the precise terms of the contract imposed on defendant. The bond is set forth at length and forms part of the amended complaint. The provisions essen-

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tial to a determination of the issues here raised are as follows, viz.: "Whereas the Camm Watch Case Company * * * has made and entered into a contract with Charles A. Keene, * * * a copy of said contract being annexed hereto; and whereas the said contract provides that the said Camm Watch Case Company, party of the second part thereto, shall be responsible and answerable in damages for any loss in gold, at the termination thereof, furnished by Charles A. Keene, party of the first part thereof, and shall satisfy all claims and obligations arising because of any loss in said gold so furnished: now, therefore, we, The Newark Watch Case Material Company, a corporation, * * * said corporation being hereinafter called the surety, and The Camm Watch Case Company, hereinafter called the principal, are held and firmly bound, and by these presents are so held and firmly bound, unto the said Charles A. Keene, in the sum of ten thousand ($10,000) dollars. Provided, however, that if the said principal shall well and truly discharge, at the termination of said contract, referred to herein, the obligations arising as hereinbefore set forth, then these presents shall be and become null and void." The defendant's counsel points out that, while the bond fixes the time when defendant's liability would accrue as of the termination of the contract between the Camm Company and plaintiff, i. e., January 1, 1902, the complaint sets forth an accounting had between the Camm Company and plaintiff on September 1, 1901, and that for the deficiency then found to be existing, this action is brought upon the bond. It is the claim of the defendant that plaintiff should have waited until January 1, 1902, and should then have brought the action for the deficiency found to be existing at that time, as no liability of defendant had accrued on September 1, 1901, or at any time previous to January 1, 1902, the time of the termination of the contract between plaintiff and the Camm Company. As we have seen, the complaint alleges that the contract between the Camm Company and the plaintiff, which we will call the first contract, authorized an accounting at any and all reasonable times during the continuance of the contract, and that such an accounting was had on September 1, 1901, when the deficiency here claimed was found to exist; while the bond, which we will call the second contract, provides that the liability of defendant shall be for any deficiency existing on January 1, 1902. But, if the deficiency, found due on September 1, 1901, continued

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to be due and owing on January 1, 1902, then, under the terms of the second contract, the defendant became liable for such deficiency. The bond, as we have seen, also recites the fact that the Camm Company had agreed in the first contract to be responsible and answerable in damages for any loss in gold that existed at the termination of the contract, *i. e.*, on January 1, 1902. If, however, the first contract also authorizes an accounting between the Camm Company and plaintiff before the termination of the contract, this provision does not vary the terms of the obligation of the Camm Company, or, in case of its default, of the defendant, to pay the deficiency found to be existing on the termination of the contract, *i. e.*, on January 1, 1902. The accounting could be had from time to time during the continuance of the contract, but the obligation to pay the deficiency accrued on the termination of the contract. The Camm Company was at liberty to pay the deficiency as soon as discovered upon the accounting of September 1, 1901, although its obligation to pay, for which defendant became surety, did not accrue until January 1, 1902. The defendant is not liable for the deficiency found to exist on September 1, 1901, unless that deficiency continued to exist on January 1, 1902. The question now presents itself, does the amended complaint, by fair and reasonable intendment, show that the deficiency, found to be due on September 1, 1901, was still due and owing on January 1, 1902? The amended complaint alleges that the Camm Company has not (at the time of the making of the amended complaint) complied with plaintiff's demand for payment, and "that the terms of the bond have not (at the time of the making of the amended complaint) been complied with, and the obligations have not been met, in that the principal named therein (the Camm Company) has not satisfied or made good to the plaintiff, the obligee named therein, the loss which arose to the plaintiff, as aforesaid; that the defendant, the surety named therein, has been apprised of such loss and requested to pay the same, which the said defendant has failed to do, or any part thereof; and that plaintiff is now suffering a loss, because of the default of the surety upon its said bond, in an amount hereinafter named." It clearly appears, from the wording of the amended complaint, that, at the time of its making, there existed the deficiency claimed, and that neither the principal nor the surety had, in any part, responded to plaintiff's request to satisfy the same. A complaint

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relates to the time of the commencement of the action, and the rights of the plaintiff are to be determined as they existed when suit was commenced, as the complaint is presumed to refer to existing conditions. 4 Ency. of Pl. & Pr. 605. It appears from the statement of plaintiff's counsel that the summons and complaint were served on May 22, 1902, and the amended complaint, which was verified on July 15, 1902, was served on July 16, 1902. It appears, therefore, that the facts alleged in the amended complaint were existing several months after the termination of the contract, and consequently after the defendant's liability had accrued. The deficiency, which had been found to exist on September 1, 1901, continued to exist on July 15, 1902, six months and a half after the liability of the defendant had accrued; and the action to recover this deficiency was begun on May 22, 1902, nearly five months after the termination of the first contract and the date of the maturity of defendant's obligation to pay. I am of opinion that, under the liberal construction authorized by the authorities above cited, the amended complaint does set forth facts sufficient to constitute a cause of action, and that defendant's contention is not well taken. The demurrer must be overruled, with leave to answer, on payment of costs.

Demurrer overruled, with leave to answer on payment of costs.

ALFRED T. CHRISTIANSON, Plaintiff, *v.* HENRY O'NEIL, Defendant.

(Supreme Court, New York Special Term, October, 1902.)

Slander — Insufficient justifications of charges of larceny and of being a "skin".

Where the slanderous charge is that the plaintiff, a tenant of the defendant, stole a gas radiator from the demised premises, it is no justification to answer that the plaintiff wrongfully removed therefrom a gas chandelier, nor can a charge of larceny be justified by alleging a mere wrongful taking.

A charge that a person is a "skin" cannot be justified by alleging that he was in arrears for rent.

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DEMURRER to defense.

Joseph Rosenzweig, for plaintiff.

George M. Baker, for defendant.

KEENER, J. The plaintiff sues to recover damages for slander. The words constituting the alleged slander are: "I want that gas radiator returned to me at once and if you don't I will have you arrested and behind the bars before sundown. The radiator belongs to me and you stole it from my place. You are a thief and a skin." As a defense in justification, the answer alleges that the plaintiff, some time prior to the date of the alleged slander, had been a tenant of a loft belonging to the defendant; that when the plaintiff vacated the loft, he "wrongfully removed and took away from said premises a gas chandelier, * * * the property of the defendant," and that he did this "without the knowledge or consent of the defendant." The defense also states that the plaintiff owed the defendant $100, arrears of rent. To this defense the plaintiff has demurred.

Adopting the defendant's view of the case, the complaint sets forth three charges, as follows: (1) "You stole my gas radiator from my place," (2) "You are a thief," and (3) "You are a skin." The charge of stealing a radiator is not met by the defense in justification, which alleges the taking of a chandelier. The justification must concern the same subject-matter as the charge. Palmer v. Haight, 2 Barb. 210; Stiles v. Comstock, 9 How. Pr. 48. Furthermore, neither the first nor the second charge is met by a defense that sets forth nothing beyond a "wrongful taking." The charge was larceny. The language of the attempted justification therefore fails to comply with the rule requiring such a defense to be couched in precise and unmistakable language. Snyder v. Andrews, 6 Barb. 43, 56; Orvis v. Dana, 1 Abb. N. C. 268, 286. Even in the interpretation of the defense most favorable to the defendant, namely, that it at least states facts sufficient to make the plaintiff liable for damages for a conversion, the justification is not broad enough. If the plaintiff be charged with stealing, the allegation of a merely tortious taking, as distinguished from a taking with criminal intent, is no justification. Fero v. Ruscoe, 4 N. Y. 162; Shepard v. Merrill, 13 Johns. 475. As to the third

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charge, it needs no argument to show that to charge a man with being a "skin" is not met by a defense in justification that he owes the defendant money under the terms of a contract.

Inasmuch as we consider the defense worthless as a justification of any of the charges, it becomes unnecessary to make extensive comment on the cases cited by the defendant. One case, referred to by him in support of the contention that the justification need not be set out with the same particularity as is required in an indictment, does not refer to a plea in justification at all, but to the words constituting the alleged slander. Dudley v. Nowill, 11 App. Div. 203, 204. Of the other cases cited by the defendant in support of the argument that the justification of any one charge will make the defense sufficient, nearly all are instances of answers in which at least one charge *was* well justified; but the present situation resembles that in another case cited by him, in which the court said, in sustaining a demurrer to a defense: "But we are unable to find a single independent libelous charge complained of in the complaint which is fully justified in the answer." Baldwin v. Genung, 70 App. Div. 271, 272.

The demurrer is therefore sustained, with costs to abide the event of the trial of the issue of fact. Settle decision and judgment on notice.

Demurrer sustained, with costs to abide event of trial of issue of fact.

THE NATIONAL BANK OF THE REPUBLIC, Plaintiff, *v.* NANCY THURBER, Defendant.

(Supreme Court, New York Special Term, October, 1902.)

Creditors' action under the Personal Property Law to set aside a deceased insolvent's transfer as in fraud of creditors — Right to sue — Preference — Taking with notice of creditors' rights — Effect on a complaint of a demurrer to a defense.

Where a judgment creditor of a deceased insolvent sues, under L. 1897, ch. 417, § 7, on behalf of itself and all other creditors, to require the defendant, the insolvent's widow, to account for certain stock alleged to have been transferred to her by him in fraud of his creditors and for his own use, the complaint is not insufficient

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merely because it fails to allege that the insolvent's administrator had upon request refused to sue — and this because the said statute makes the creditor's right to sue primary.

It is not a defense to such an action for the widow to allege a transaction occurring between the plaintiff, the insolvent and certain creditors after his insolvency by which they and the plaintiff secured a preference, as a failing debtor may lawfully prefer a creditor and the latter may accept the preference provided he is without knowledge of the debtor's fraudulent intent.

Where the widow received the stock in suit with notice of equities therein in favor of her husband's creditors, it is not a defense to her that she is assignee under one of said preferred creditors of a claim against her husband which exceeds the value of the stock the plaintiff seeks to reach.

A demurrer to a defense entitles the defendant to question the sufficiency of the complaint.

DEMURRER to answer.

George S. Hastings, for plaintiff.

Henry Aplington, for defendant.

KEENER, J. This action is brought by a judgment creditor of a deceased insolvent, Horace K. Thurber, on behalf of itself and all other creditors, to require the defendant Nancy Thurber to account for certain stock alleged to have been transferred to her by the decedent in fraud of his creditors. The defendant has interposed an answer and the issue now before the court arises on the plaintiff's demurrer to the "Fifth" and "Sixth" defenses contained therein.

The fifth defense states that more than a year after the date of the decedent's alleged insolvency he executed an instrument under seal by which he transferred to Henry W. Cannon and Henry Aplington a large amount of property, with directions that it be converted into cash and that its proceeds be used to pay the amounts owing to the plaintiff and to five other banks, or be divided among them *pro rata* if insufficient for payment in full. The instrument is not before the court. The answer quotes what it states is "the language used in said instrument" and continues "reference to said instrument is hereby made and the same is

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made a part hereof." But no copy of the instrument is annexed to the answer, nor are its contents disclosed by any pleading in the case. This is not a valid incorporation of the document. It is then alleged that later more property was put into this trust, and that over $40,000 was realized from the last-mentioned property; that the plaintiff has received dividends from these trustees; and "that there still remains certain property under the control of said trustees by virtue of said instrument and the plaintiff herein still claims an interest therein under said instrument."

The defendant contends that these allegations constitute a defense because they demonstrate that the plaintiff, during the insolvency of Mr. Thurber, became a preferred creditor and as a party to the trust agreement received and retained the proceeds of the trust property. The only case cited in support of this contention is New York County Nat. Bank v. American Surety Co., 69 App. Div. 153. That was an action against the indemnitor of a sheriff for damages for the seizure and conversion of certain goods. The defendant urged that the plaintiff ought not to be permitted to recover because it had fraudulently obtained a preference. The court however relied upon the jury's finding that the plaintiff was innocent of fraud. The court fully recognizes the familiar doctrine that a failing debtor has a right to prefer certain of his creditors, and that a creditor may accept a preference, provided he is without knowledge of the debtor's fraudulent intent. The preference, if such there was, in the case before us was accepted by the plaintiff in absolute good faith, since nothing in the pleadings can justify a different inference.

The complaint admits the payment of $4,472.59, on account of the plaintiff's claim of $52,018.78 and interest, and nothing appears in the answer to indicate that the amount thus paid was greater than the sum stated. There is surely nothing fraudulent in the plaintiff's diligence in collecting this portion of its claim. And it is difficult to conceive how the plaintiff's claim upon the moneys alleged to remain in the trust fund is an indication of bad faith on its part. As the form of relief granted by the statute under which this action is brought requires the distribution of the fund, when reached, under the supervision of the court, it is clear that even if the plaintiff were in some way an unlawfully favored creditor, which does not appear, the rights of the other creditors would be in no danger.

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If the fifth defense is relied upon as a plea of payment, its insufficiency is too patent for comment.

The sixth defense states that the Commercial National Bank, one of the beneficiaries under the trust above mentioned, had a claim against the decedent amounting to $491,882.36, which it assigned to the defendant before the decedent's death for a valuable consideration; that the amount of the claim so assigned and which remains unpaid is in excess of the value of the stock sought to be reached by this action. The defendant's counsel argues with some ingenuity that Mrs. Thurber ought not to be compelled to relinquish the stock because of her greater claim against the decedent's estate, although he admitted upon the argument that the claim would not give her an independent cause of action against the plaintiff. But a complete answer to this contention is that Mrs. Thurber received this stock with notice of the equities in favor of decedent's creditors. The allegations of the complaint, which stand as admitted for the purpose of this demurrer, certainly implicate her in the fraud of the transaction and show that she took the stock with knowledge of the fraud. For the sake of illustration, suppose that this stock had been transferred to and received by the decedent in fraud of the creditors of the person transferring it to decedent, and decedent had transferred this stock to the Chemical Bank as security for its claim, the bank taking with notice of the fraud which had been so perpetrated. Surely the bank could not have resisted the claim if sued in an action like the present. The bank's assignee, then, who had notice of the fraud, is in no better position. It hardly need be added that the transfer of the stock to her was void as against existing creditors, under section 23 of the Personal Property Law, as a trust for the use of the person creating it.

The demurrer to these defenses enables the defendant to question the sufficiency of the complaint. Baxter v. McDonnell, 154 N. Y. 432. It is therefore necessary to investigate its sufficiency.

The complaint is drawn under section 7 of the Personal Property Law (Laws of 1897, chap. 417). That section, so far as it relates to the plaintiff, is as follows: "A creditor of a deceased insolvent debtor, having a claim against the estate of such debtor, exceeding in amount the sum of one hundred dollars, may, without obtaining a judgment on such claim, in like manner, for the benefit of himself and other creditors interested in said estate, disaffirm,

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treat as void and resist any act done or conveyance, transfer or agreement made in fraud of creditors or maintain an action to set aside such act, conveyance, transfer or agreement. Such claim, if disputed, may be established in such action. The judgment in such action may provide for the sale of the property involved, when a conveyance or transfer thereof is set aside, and that the proceeds thereof be brought into court or paid into the proper surrogate's court to be administered according to law."

It would seem difficult to express in clearer language the legislative intent to vest in a creditor a primary right to be exercised independently of the right vested in any one else. That such was the intent is apparent when it is remembered that this right was not given to creditors until an amendment enacted in 1899. Section 7 was originally chapter 314 of the Laws of 1858, which permitted an executor, administrator, receiver, assignee, or other trustee of an estate or the property and effects of an insolvent estate, corporation, partnership, or individual to disaffirm acts of the insolvent in fraud of its or his creditors and to follow the insolvent's property into the hands of the fraudulent transferee by an action on behalf of the creditors. The defendant urges that to entitle a creditor to bring this action, the complaint should have alleged that the administrator had been first requested to bring it and had refused, citing Crouse v. Frothingham, 97 N. Y. 105; Lichtenberg v. Herdtfelder, 103 id. 302; Spelman v. Freedman, 130 id. 421; Ettlinger v. Persian R. & C. Co., 142 id. 189; and Campbell v. Heiland, 55 App. Div. 95. But the defendant has failed to notice that the first and second of these cases were decided while the statute of 1858 was in force, and not under the statute in its present form. In 1889 the statute was amended (Laws of 1889, chap. 487), as stated above, so as to allow the prosecution of this action by a creditor. The action in Spelman v. Freedman, *supra*, was commenced before this statute became a law, and the decision by the Court of Appeals, though subsequent thereto, was controlled by the statute as it stood prior to the amendment of 1889, and is therefore not an authority for the defendant's contention. Of the two other case cited, both of which are of later date than the amendment of 1889, the first, Ettlinger v. Persian R. & C. Co., was a suit by a bondholder to procure the foreclosure of a mortgage standing in the name of a trustee.

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The *cestui que trust* was, of course, required to show why the action was not brought by the trustee, in whom the right to bring it was vested. The second, Campbell v. Heiland, presents a state of facts sufficient to bring the case under the statute under consideration. But in that case the plaintiff alleged a demand upon and refusal by the executor to bring the action. The question here raised could not therefore have been involved in that case.

The statute of 1889 was in turn amended in 1894 (Laws of 1894, chap. 740), when a sentence was added regulating the judgment to be granted under this law, and was enacted in its present form in 1897, as stated above. The complaint complies with the provisions of the statute and therefore states facts sufficient to constitute a cause of action.

The demurrer to the "fifth" and "sixth" defenses is therefore sustained, with costs. Settle decision and interlocutory judgment on two days' notice.

Demurrer sustained, with costs.

JOHN B. McDONALD, Plaintiff, *v.* EDWARD M. GROUT, as Comptroller, Etc., Defendant.

(Supreme Court, New York Special Term, October, 1902.)

New York city — Rapid Transit — The contractor with the city must pay the cost of constructing, in the subways, ducts for electricity, the motive power.

In passing the acts relative to rapid transit in the city of New York the Legislature intended that the contractor with the city should bear every expense connected with the motive power and the means of operation.

The cost of constructing, in the side walls of the subways or tunnels, conduits, placed in ducts, for conducting electricity, the selected motive power, must be borne by the contractor as constituting "equipment" within the legislation and the contract, and the rapid transit commission cannot, by voting this cost to be extra work, change its character to "construction" payable by the city.

MOTION for a writ of mandamus. The material facts are stated in the opinion.

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Strong & Cadwalader, for petitioner.

George L. Rives, Corporation Counsel, for respondent.

O'GORMAN, J. This is an application for a writ of mandamus requiring the comptroller of the city of New York to pay a voucher for $400,000 issued by the Rapid Transit Commission to the contractor for extra work for placing ducts in the tunnel. Under the contract for the construction of the underground rapid transit railway the city is to bear the cost of construction and the contractor is to take a lease of the road at a stipulated rental and bear the cost of its equipment and maintenance. The contract provides that the motive power shall be electricity or compressed air, which shall be so used as to involve no combustion in the tunnels or any injury to the purity of the air in the tunnels. It further provides that the contractor's plans and methods of equipment are subject to the approval of the board of rapid transit commissioners. In compliance with this latter provision, the contractor proposed to the rapid transit commissioners that electricity, and not compressed air, be adopted as the motive power, that the power be delivered to the trains through a third rail or equivalent conductor, "and that the current should be carried in conduits placed in suitable chambers in the side walls of the subway." The board approved this plan by the following resolution: "Resolved, That the adoption by John B. McDonald, contractor, of electricity for the motive power for the rapid transit railroad in the boroughs of Manhattan and The Bronx, now under construction, be and the same hereby is approved; that the conduits for such electricity may be placed in ducts in the side walls of the tunnel, subject, however, to the approval of the plans therefor by the chief engineer; and that the electrical conduits may be installed in such ducts, but subject to plans to be approved by the chief engineer; but provided, however, that the cost of such conduits and installation be borne by the contractor as part of the cost of construction under the contract between him and the city." The contractor protested against the final part of this resolution, and renewed his request previously made that the "additional cost made necessary by the construction of the vitrified ducts, or conduits, in the tunnel walls, and the expense of additional excavation required by such change" should be paid for as extra work. There-

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after the board, by a majority vote, determined that the additional portion of the tunnel constructed for electrical cables and including the mason work chambers in which the cables are laid is part of the road and not part of the equipment, and should be regarded as extra work in the construction. This action of the rapid transit commissioners cannot be upheld. While acting within the authority delegated to them their action will not be interfered with, but where it is claimed they have gone beyond the scope of their authority their conduct will be reviewed by the courts. Concededly under the statute the commissioners have no right or power to designate as work of construction what the Legislature has declared to be equipment. The counsel for the petitioner upon the argument admitted that in a plain case the aid of the court might be invoked by the aggrieved party; but it must be obvious that the simplicity or complexity of the case cannot affect the legal rights of the parties. In Matter of Rapid Transit R. R. Commissioners, 5 App. Div. 290, the Appellate Division, speaking of another provision of the statute, said: "The rapid transit commissioners have no power to fetter the action of the courts, and they have no right to deprive the contractor of this provision of the law by any restrictions in the contract," and, it may be added, they have no power to deprive the city of its rights under the statute. Under the act creating the commission, the word "equipment" is given a much broader significance than it usually receives. It includes not only motors and cars, but also, among other things, all power-houses, real estate upon which power-houses shall rest, wires, ways, conduits, mechanisms, implements, and devices of every nature whatsoever used for the transmission of motive power, whether such equipment be situate on or near or separate from the railway. It is clearly the duty of the contractor to supply at his own cost the rolling stock and all means of propulsion. These ducts or tubes, placed by the contractor in the side walls of the tunnel, are no necessary part of the permanent structure. They are avowedly to be used for the sole purpose of transmitting power. The mere permission given by the board to the contractor to locate the tubes in the side walls of the subway is not sufficient to make the work in question work of construction. The board might have refused its permission. It might have required the contractor to locate the tubes at the top of the tunnel, between the exterior upper surface and

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the bed of the street, or in a trench removed to one side of the tunnel, or in other streets parallel to the streets through which the railroad will run, with occasional spurs to the line of the railroad. If these tubes as now being laid and the increased excavation will cost upwards of $1,200,000, as claimed by the petitioner, the cost would probably be much greater if one of the other methods were adopted, and certainly in none of these cases could the tubes or the necessary excavation be regarded as a part of the construction. The fact that for the convenience of the contractor and the better operation of the road, he was allowed to insert the tubes in the walls of the tunnel does not make the tubes any the less a part of the equipment as defined by the act. They are an incident of the equipment, and nothing more. It will not be contended that they are an essential part of the structure. If not needed as a means of propulsion they serve no purpose whatever. They are simply a way, conduit or device for transmitting power, and, being part of the equipment, the rapid transit commissioners had no power to treat any part of the work as construction or to award the contractor extra compensation therefor. The claim that the equipment intended by the statute is something in the nature of machinery or mechanism or something otherwise separable from the structure is unfounded. The tubes which will convey the electricity from the power-house on the Hudson river, through the public streets to the line of the railroad, are equipment, but will be connected in a very permanent fashion with the railroad itself. While it may have been contemplated that a part of the equipment would be separable from the road, there is nothing in the language of the act which in express terms or by necessary implication indicates that all the equipment must be separable. Indeed, the act expressly speaks of the equipment being "on or near or separate" from the road. The rules as to fixtures invoked by the petitioner have no application. This controversy turns upon the enlarged significance to be given to the word equipment as defined by the statute, and it seems to be quite clear that while the city was to pay for and become the owner of the permanent structure, which was always to be available for the carriage of passengers and property, the Legislature intended that the contractor should take every risk and bear every expense connected with the motive power and the means of operation. The lease to the contractor is to run for

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fifty years, and if during that period new means of propulsion or new methods of applying old forms should render these tubes or ducts useless, the loss should fall upon the contractor and not upon the city.

Application for a mandamus denied.

ISIDOR PICKER et al., Plaintiffs, v. ERNEST WEISS, Defendant.

(Supreme Court, New York Special Term, October, 1902.)

Pleading — To be sustained on demurrer if possible — Contract and pleading a breach thereof.

However inartificial a pleading may be, it must be sustained upon demurrer if any cause of action can be spelled out of its allegations.

A counterclaim, interposed by an agent to his principals' action for moneys converted, alleging that they also employed him to sell their liquors to certain customers of his own, that they agreed to "furnish liquors of the quality which the same were held out to represent", and pay him a commission on such sales, sets up a contract upon their part to furnish customers liquors of the quality they had been represented to be and a failure to furnish that quality would prevent the agent from earning his commissions.

A breach of such an agreement is not sufficiently pleaded by a general allegation that the plaintiffs "did not keep their promise and guarantee", when not accompanied by the particular facts deemed to support this conclusion of law.

Various allegations deemed insufficient to allege a breach.

DEMURRER to counterclaim.

Stern, Singer & Barr, for demurrants.

Rosenthal & Berman, for defendant.

SCOTT, J. The plaintiffs sue for moneys alleged to have been converted by defendant while acting as their agent. The defendant by way of counterclaim alleges as follows: "For a separate defense and by way of set off and counterclaim the defendant alleges that it being represented to plaintiffs and they knowing that the defendant had a number of customers who made their

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purchases of liquor only through defendant as a middleman and who depended upon defendant by reason of his furnishing them with proper stock pursuant to their orders given to him therefor, the plaintiffs employed defendant to sell plaintiffs' liquors to said customers, and plaintiffs promised and guaranteed to defendant that the plaintiffs would furnish liquors of the quality which the same were held out to represent. That the plaintiffs undertook to pay defendant a commission of two to fifteen per cent. on such sales." The plaintiffs profess themselves unable to understand just what cause of action, if any, is sought to be set out in this pleading, and the defendant himself seems to be in some doubt as to whether the allegations set forth a cause of action for breach of contract, or breach of warranty or deceit, but insists that it does set forth some cause of action. However inartificial a pleading may be, it becomes the duty of the court, upon demurrer, to sustain it if any cause of action can be spelled out of its allegations. The pleading under review lacks essential elements of a cause of action either for breach of warranty or for deceit, but it does, I think, sufficiently set forth a contract between the parties. It alleges the defendant's employment by the plaintiffs to sell their liquors and their agreement not only to pay him commissions, but also their promise that they would furnish liquors "of the quality which the same were held out to represent." This phrase apparently means that the plaintiffs agreed that when the defendant as their agent sold liquors which the plaintiffs represented to be of a certain quality, they, the plaintiffs, would deliver in fulfillment of such sale liquors of the same quality as they had been represented to be. It is evident that a failure to keep this agreement might result in loss to the defendant, because the purchasers would be under no obligation to accept goods of a poorer quality than those which they had agreed to buy, and if they did so refuse the defendant might lose the commissions which he would have earned if the sales had been consummated. If this was the agreement sought to be pleaded it remains to be seen whether the defendant has sufficiently set forth its breach. He avers "that the defendants did not keep their promise and guarantee aforesaid to defendant's damage $392.10." This general allegation is not sufficient. It contains only a conclusion of law and states no particular facts upon which to base the conclusion. Schenck v. Naylor, 2 Duer, 675; Krower v. Rey-

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nolds, 99 N. Y. 245. The defendant however undertakes to specify wherein the plaintiffs have broken their agreement. *First* "by reason of goods on order accepted, being delivered too late upon which the customers cancelled the orders and returned the goods" and the defendant lost his commission. This dereliction has no connection with the special promise said to have been made by plaintiffs. *Second* "by reason of imperfect goods by defendant sold and delivered by plaintiffs, upon which the customers returned the goods, which were unmerchantable" and the defendant lost his commissions. This specification contains no allegation as to the quality of the goods which were agreed to be sold, or that the goods delivered did not equal in quality those which were sold. *Third* "by reason of the customers of defendant having been deceived by plaintiffs against which deception defendant cautioned plaintiffs frequently in the delivery of liquors to the customers on defendant's orders, the following customers having the respective orders for liquors to be filled refused to give the same to defendant to be filled they having by reason of such deception lost their confidence in the plaintiffs' liquors." This seems to mean that there were certain orders which defendant might have obtained but did not because the plaintiffs had, in previous transactions, in some way deceived the intending purchasers, whereby the defendant lost the opportunity to earn commissions which but for plaintiffs' previous deceitful conduct he might have earned. These damages are certainly somewhat remote and speculative, but even assuming that they might be recovered under a proper pleading, the statements contained in the third specification of breach are not sufficient to establish such a breach, because it is not alleged wherein the breach consisted or whether or not it consisted in a failure to "furnish liquors of the quality which the same were held out to represent." My conclusion is that even if a contract can be found to be set forth in the counterclaim, the defendant has failed to sufficiently allege its breach.

The demurrer must therefore be sustained, with costs, with leave to defendant to amend his answer within twenty days on payment of costs.

Demurrer sustained, with costs, with leave to defendant to amend answer within twenty days upon payment of costs.

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ESTELLE HASBERG, as Administratrix, Etc., Plaintiff, *v.* MAX MOSES, Impleaded with the Mutual Life Insurance Co., Defendant.

(Supreme Court, New York Special Term, October, 1902.)

Equity — Action to determine conflicting claims to a fund which the debtor is ready to pay — Demurrer to complaint.

A complaint, by one who alleges herself to be the sole child and administratrix of Emanuel Popper, deceased, insured in a solvent life insurance company, alleging that it is willing and ready to pay the amount of the policy provided she and the defendant Max Moses will sign a receipt for the money, that Moses refuses to sign, claiming that Popper assigned the policy to him, that the plaintiff is ignorant of the said assignment and that it is void or has been discharged, and praying for general relief, states a cause of action against Moses, and the action may be maintained as one to determine conflicting claims to a fund which, if not actually in court, is acknowledged by a solvent company to be due from it and which that company is willing to pay as soon as it be determined to whom payment should be made.

DEMURRER by the defendant Moses to the complaint.

Edward W. S. Johnston, for plaintiff.

Benno Loewy, for defendant Moses.

SCOTT, J. This is an action to determine conflicting claims to the proceeds of an insurance policy upon the life of Emanuel Popper, deceased. It is alleged that Popper took out a policy of insurance payable upon his death to his executors, administrators or assigns within sixty days after notice and proofs of death; that Popper died in May, 1902, and thereafter the plaintiff furnished the insurance company with due proofs of death, and said company received such proofs and ordered the amount of the policy paid, and notified plaintiff that it was ready, able and willing to pay, and would pay the amount of said policy with the additions thereon upon receiving a receipt to be signed by the plaintiff

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and the defendant Moses; that the plaintiff is the only child, next of kin and heir-at-law of said Emanuel Popper and the sole administratrix of his estate; that the plaintiff has applied to the defendant Moses to sign a receipt, but said defendant has refused to sign the same asserting both to the insurance company and to plaintiff a claim that he is entitled to receive the amount of the policy, alleging that the said Popper had during his lifetime assigned said policy to him, the said Moses. The plaintiff avers her ignorance of any such assignment, and alleges that if it was ever executed by Popper it was executed under such circumstances as would render it void, or was given as security for an indebtedness which has been fully paid and discharged. The defendant Moses demurs upon the ground that as to him the complaint does not state facts sufficient to constitute a cause of action. It is evident that the action is one to determine conflicting claims to a fund, which if not actually in court, is acknowledged to be due by a solvent company which expresses its instant willingness to pay the amount due upon the policy so soon as it be determined to whom payment ought to be made. It is well settled that neither the nature of the action nor the sufficiency of the allegations embraced in the complaint is absolutely determined by the prayer for relief, especially where, as in the present case, there is a general prayer for such relief as the plaintiff may be entitled to. The demurring defendant bases his contention upon the recent case of McCabe v. McCabe, 67 App. Div. 589, which was an action somewhat similar to the present. If the facts were identical that case would be a controlling authority. There is however an important difference, in that in the McCabe case the complaint showed a demand upon the insurance company and its refusal to pay, whereas in the present case in the complaint, which for the purposes of the demurrer must be taken as true, it is alleged that the company is ready and willing to pay. That this difference in the allegations as to the attitude of the company is significant appears from the opinion of the Appellate Division in the McCabe case, wherein it is said: "The insurance company doubtless would have the right if it admitted liability on the policy, to apply for leave to pay the fund into court and allow the parties to contest their respective rights thereto; but here there is no fund and the defendant has denied its liability by refusing to pay." In the present case the company does admit its

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liability upon the policy, and there is a fund. If the plaintiff had sued the company alone it could, and doubtless would have followed the course suggested by the Appellate Division in the McCabe case, and it would doubtless pursue the same course if this demurrer should be sustained so that it was left the sole defendant in the action. The plaintiff would then be called upon to bring in the defendant Moses, and the controversy between them would be precisely where it is under the present pleading. It is not necessary to go through all this circumlocution to bring the parties back where they now are.

The demurrer must be overruled, with costs, with leave to the defendant to withdraw the demurrer and answer over within twenty days on payment of costs.

Demurrer overruled, with costs, with leave to withdraw demurrer and answer over within twenty days on payment of costs.

THE KNICKERBOCKER ICE CO., Plaintiff, *v.* THE FORTY-SECOND STREET & GRAND STREET FERRY RAILROAD CO., THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, THE DEPARTMENT OF DOCKS OF THE CITY OF NEW YORK, and EDWIN A. POST, J. SERGEANT CRAM and JAMES MATTHEWS, Composing the Board of the Department of Docks of the City of New York, Defendants.

(Supreme Court, New York Special Term, October, 1902.)

New York city — Grant of water lots at the foot of 42d and 43d streets, Hudson river — A city cannot grant away a public pier lying wholly within the lines of a street — Adverse possession not applicable to a public nuisance — Permissible variation in the manner of making an enforced public improvement — The city's rights in its water lots.

In 1850 the city of New York conveyed to one Lindsley water lots in the Hudson river, bounded on the north and south respectively by the center lines of 43d and 42d streets, on the east by high water mark and on the west by the westerly line of 13th ave., "the permanent exterior line of said city", so much of 12th and 13th aves.

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and 43d and 42d sts., shown on annexed maps, as came within the boundaries being excepted, and he agreed at his own expense to make these streets and avenues, then having no potential existence, as well as wharves and bulkheads forming a part thereof, when ordered to do so by the city. In 1852 it conveyed to him a pier, just north of the water lots, lying wholly within the lines of 43d street, at its foot and in 12th ave. also. In 1855 Lindsley conveyed all to one La Farge and thereafter by *mesne* conveyances under the latter the pier came to the plaintiff, and the water lots, which were essential to the use of the south side of the pier and were so used after 1860, to the defendant railroad company. In 1873 the pier was extended by the city upon the plaintiff's agreement to pay it rent for the extension and to claim no title to the extension. In 1890 the defendant, the department of docks, upon the footing of the deed of 1850, by resolution, ordered the said railroad company to construct a bulkhead in front of its water lots between the south side of 43d street and the south side of 42d street, and as this would have had the effect of filling in the land under water south of the plaintiff's pier, as originally constructed, it brought this action before 1892 for an injunction. In 1897 the resolution for a bulkhead was rescinded but in 1900 the board ordered the railroad company to construct 12th ave. between the middle of 43d street and the middle of 42d street — which would have been equally detrimental to the south side of the pier.

Held, that the action could not be maintained as the plaintiff had shown no title to the pier or the land under it.

That the city of New York had no power to grant away a public pier located entirely within the boundaries of a street held in trust by it for public use.

That as to the extension of the pier the plaintiff was only a licensee of the city.

That nearly forty years' occupation of the pier could give the plaintiff no title thereto by adverse possession as its occupation thereof constituted a public nuisance.

That the defendant railroad company might lawfully construct a bulkhead across the water lots where that form of construction was required by the Legislature and where the result of it would practically be the same as if 12th ave. had been filled in.

A statement of the rights of the city of New York, borough of Manhattan, in its lands under water.

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ACTION for an injunction.

Daly, Hoyt & Mason (Albert Stickney and M. Edward Kelly, of counsel), for plaintiff.

George L. Rives, Corporation Counsel (Edwin J. Freedman, of counsel), for city.

James A. Deering and Clarence L. Barber, for defendant railroad company.

STECKLER, J. The action is for an injunction restraining the defendants the city of New York, the Department of Docks and the Forty-second St. & Grand St. Ferry R.R. Co. from constructing a bulkhead across the railroad company's water lots in the Hudson river from the southerly side of West Forty-third street to the southerly side of West Forty-second street.

In July, 1850, the city conveyed to Caleb F. Lindsley in fee by two conveyances certain water lots, or grounds under water, bounded on the north by the centre line of Forty-third street, on the south by the centre line of Forty-second street, on the east by high-water mark, and on the west by the westerly line of Thirteenth avenue, said last mentioned line being described as "the permanent exterior line of said city." These instruments were duly recorded in August following. There was excepted from said deeds (Langdon v. Mayor, 93 N. Y., 149) so much of the granted premises as by the annexed maps formed parts or portions of Twelfth and Thirteenth avenues, Forty-third and Forty-second streets for the uses and purposes of public streets, avenues and highways. The grantee covenanted for himself, his heirs and assigns, when required so to do by the grantor, to build at his own expense, in accordance with the resolutions or ordinances of the grantor, good and sufficient bulkheads, wharves, streets or avenues which should form so much and such parts of Forty-second and Forty-third streets, Twelfth and Thirteenth avenues as fell within the limits of the described premises, and reserved from out thereof for public streets; to fill in the same with earth and regulate and pave the same and lay the sidewalks thereof; to forever at his own expense keep in good order and repair the whole of said streets and avenues included in the con-

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veyances, and to obey all resolutions and ordinances of the grantor in relation thereto; also that those portions of the streets or avenues included in the deeds should forever remain streets, avenues or highways for the common use and passage of the inhabitants of the city. On its part the city covenanted that Lindsley, upon observing his covenants, should be entitled to wharfage accruing "from that part of the said exterior line of the said city lying on the westerly side of the hereby granted premises fronting on the Hudson River," excepting therefrom the wharfage to accrue from the westerly end of the bulkhead in front of the entire width of the southerly half of Forty-third street, and from the westerly end of the bulkhead in front of the northerly one-half part of Forty-second street. It was further provided in the deeds that the intent of the conveyances was merely to convey to the grantee whatever estate the grantor had or could lawfully claim in the premises.

On November 11, 1852, the city conveyed to the said Caleb F. Lindsley the property now claimed by plaintiff by the following description: "All the estate, right, title and interest of the said parties of the first part of, in and to all that certain pier in the City of New York, situate at the foot of Forty-third street, North River, bounded, described and containing as follows: Beginning at the point formed by the intersection of the northerly side of Forty-third street with the easterly line or side of Twelfth avenue; running thence southerly, along the easterly side of Twelfth avenue to the northerly side of said pier; thence westerly, two hundred and eleven feet three inches; thence southerly, forty feet five inches; thence easterly, two hundred and twelve feet two inches to the easterly side of the Twelfth avenue; and thence southerly to a point where the southerly side of Forty-third street intersects the said Twelfth avenue. Together with the extent of the present width of the street (neither the pier nor the description covering the width of the street), with the right of wharfage thereon, and together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the above

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described premises and every part and parcel thereof, with the appurtenances, subject to the right of the parties of the first part to order said pier extended into the river at the expense of the said party of the second part whenever and in whatever way they may see fit, reserving to the party of the first part to extend said pier at the expense of the corporation of the City of New York or to grant the right to do so to other parties if the said party of the second part fail or neglect to extend said pier when ordered so to do, in which case the right of wharfage, &c., at the portion of the pier extended shall belong to the parties at whose expense the extension shall be made." And the deed provided, as had the deeds of 1850, that the true intent and meaning of the conveyance was to pass only whatever right and title the city had in the premises.

In 1855 Lindsley conveyed the property described in the three deeds to John La Farge, and both the plaintiff and the defendant railroad company hold under *mesne* conveyances from La Farge's devisees. In 1860, by deed recorded in May of that year, La Farge's devisees conveyed the pier property to Charles Scholey, James Schindler and Edward E. Conklin; and they thereafter, by deed dated July 21, 1865, and recorded January 17, 1870, conveyed the same property to the New York Ice Company, which company on March 7, 1867, by deed recorded January 17, 1870, conveyed said premises to the plaintiff. By deed dated in February, 1863, La Farge's devisees conveyed all the property described in the three deeds to Lindsley, except the pier property theretofore conveyed to Scholey, Schindler and Conklin, to Charles E. Appleby, who in the following March conveyed the same to the defendant railroad company.

In 1873, by order of the board of docks, the pier was extended into the river a further distance of 300 feet and widened so as to be 60 feet, the entire breadth of the street, in width for its entire length. These extensions were made upon plaintiff's written agreement to pay rent for the land under water covered by the extensions in length and breadth of the pier, and on the express condition that whenever any portion of the land belonging to the city and covered by the extensions should be required by the city for permanent improvement of the water front, the plaintiff would make no claims for damages for any structures or improvements upon the city's land; and upon the further conditions that

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nothing contained in the permission or order of the dock department for the extension of the pier "shall be considered or construed as a waiver of the title of the city in and to the land lying outside of the dimensions of the present pier owned by the Knickerbocker Ice Company as laid down in the deed from the Mayor, Aldermen and Commonalty of the City of New York to Caleb F. Lindsley, dated November 11, 1852."

This same plaintiff in or about 1882 brought an action in the Superior Court of the city of New York against the defendant railroad company in this action and its lessee, the New York, Ontario & Western Railway Company, to enjoin and restrain said companies from filling in the railroad company's land under water to the south of the pier; and plaintiff's motion for an injunction *pendente lite* was granted by Judge Freedman at Special Term, the grounds of the decision being that plaintiff owned the old pier and the appurtenances, together with the extent of the width of the street covered by the pier; that as to the defendants in that action the plaintiff had an easement in the waters south of the pier for the loading and unloading of vessels, which easements the defendants' acts would destroy; and that said acts were not done in pursuance of any requirement or resolution by the city, or of anything which the defendant owner was required to do in pursuance of the covenants contained in the deed by the city to Lindsley in 1850, subject to which covenants plaintiff enjoyed possession of the pier. Judge Freedman's decision apparently terminated the first action.

Subsequently, on December 4, 1890, the board of docks by resolution directed the defendant railroad to construct the bulkhead authorized by the Legislature in front of said defendant's water lot, and that resolution led to the bringing of this suit, in which the plaintiff seeks to enjoin the construction of the proposed bulkhead. In 1892, after the suit was begun, the dock board made a contract with the plaintiff, subject to the approval of the commissioners of the sinking fund, for the purchase by the city of all plaintiff's interest in the pier and the land on which it stood for $120,000, but the contract did not receive the approval of the commissioners. During the negotiations plaintiff abandoned the pier. At the request of the corporation counsel the board of docks, in 1897, rescinded the resolution requiring the construction of the bulkhead; and in 1900 the board, by resolution, or-

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dered the defendant railroad to construct Twelfth avenue, between the middle of Forty-third street and the middle of Forty-second street, and regulate and pave the same and lay the sidewalks thereon, in pursuance of the covenants of the deed by the city to Lindsley in 1850. Such construction would result in the filling in of the land under water south of the old pier.

In this action the plaintiff's title has been vigorously assailed. Nevertheless I would follow and adopt the lucid and exhaustive opinion of Judge Freedman on that point but for the fact that plaintiff's counsel, who was also counsel for plaintiff in the suit in the Superior Court, asserts that the title has never been questioned until now, and I, therefore, feel it my duty to examine into that subject.

The land on which the said pier stands and the adjoining lands owned by the defendant railroad company south of the pier are all west of the east line of the present Twelfth avenue, and were formerly land under water exterior to the high-water line of the Hudson river. The Dongan charter, in 1686, granted to the city all the land between high and low-water mark around Manhattan island, and that grant was confirmed in 1730 by the Montgomerie charter, which, in addition, conveyed to the city a strip of land 400 feet in width immediately outside of low-water mark, from Corlear's Hook, on the East River, to Bestaver's Rivulet, excepting, however, the space in front of the Battery. Both of these charters were confirmed by chapter 584 of the Laws of 1732, and afterwards by the Constitution of 1777. By chapter 115 of the Laws of 1807 a strip of land under water 400 feet wide from low-water mark was directed to be conveyed to the city along the easterly shore of the Hudson river for four miles north of Bestaver's Rivulet, and for two miles north of Corlear's Hook, on the westerly shore of the East river, and the statute provided that the proprietors of the adjacent lands should have the pre-emptive right in all grants made by the city of the lands under water conveyed under the act. The said grant was subsequently made by the commissioners of the land office. Under said statute, also, the City Map, on April 1, 1811, was filed laying out Forty-second and Forty-third streets from river to river. As so laid out Forty-third street extended to low-water mark on the Hudson river. In 1826 the strip of land 400 feet wide from low-water mark was directed

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to be extended to the north end of the island, along the Hudson and East rivers, to the Harlem river (L. 1826, ch. 58), in compliance with which mandate the commissioners in the same year made said grant to the city.

By chapter 182 of the Laws of 1837 the Legislature established Thirteenth avenue, as laid out on a map made by George B. Smith, City Surveyor, as the exterior line of the city between Hammond street and West One Hundred and Thirty-fifth street, extended all the cross streets thereto; granted to the city all the right, title and interest of the People of the State in the land and Thirteenth avenue not included in former grants; and gave to the proprietors of the adjacent lands pre-emptive rights in all grants to be made by the city of the lands under water granted by said statute. These extensions of existing streets and avenues were made by the legislative fiat, and condemnation proceedings were unnecessary to give the city title to any part of the lands below low-water mark which theretofore it did not own. Upon the survey referred to in the act the pier in question appears within the lines of Forty-third street as laid out thereon. In 1838, under the Street Opening act of 1813, the city acquired title to Forty-third street from the East River to the high-water line of the Hudson River. The municipality in 1850 regulated and paved Forty-third street, and a map was made showing the grading to the east side of Twelfth avenue, and in the same year an assessment was levied for the paving.

An ordinance was passed in 1844 regulating the powers of the commissioners of the sinking fund. It authorized said commissioners to sell and dispose of at public auction all real estate of the corporation not in use for or reserved for public purposes (title 4, sec. 17), and provided (title 4, sec. 14) that all grants made by virtue of the ordinance should contain "the usual covenants, including those in relation to streets or avenues passing through them, and also in relation to bulkheads and wharfage." This ordinance was confirmed by chapter 225 of the Laws of 1845.

In 1871 the board of docks adopted plans, by direction of the Legislature (L. 1870, ch. 383, sec. 33; L. 1871, ch. 574, sec. 6), for a system of wharf improvements, by which a new bulkhead or exterior line was established considerably east of Thirteenth avenue, as laid out in 1837, and at a distance of 150 feet west of Twelfth avenue. This bulkhead is the line of solid filling. The

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effect of the adoption of this plan was to limit the point to which Forty-third street could be built or constructed by solid filling, although the lines of the street were retained. None of the acts providing for the change of the plan of the water front discontinued the streets as established by the Act of 1837, or affected the rights of the owners of the water lots extending from Twelfth to Thirteenth avenues, other than to restrict the extent to which solid filling might be made and the length of the piers to be constructed, and also excepting that the city was given the power to construct the new bulkhead and the new pier when desired, and in so far as necessary to condemn such private property rights as should be required for the purpose.

It was testified on the trial that, among the "usual covenants" referred to in the Ordinance of 1844 prescribing how corporate real property not in use for or reserved for public purposes should be sold, were covenants that the grantee in conveyances of land under water would, at his own expense and when requested by the grantor, construct bulkheads, wharves, streets or avenues which should form so much and such parts of the streets or avenues as fell within the limits of the premises described in the conveyance and reserved from out thereof for public streets, and would fill in and pave the same and lay the sidewalks thereon; would forever keep said streets in good order and repair, and observe all ordinances and resolutions of the grantor; also covenants that said streets should forever continue to be and remain public streets; and in case of default by the grantee in building the bulkheads, wharves, streets or avenues, or in complying with any resolution or ordinance by the city, that the grantor could do said work or sell the premises at public auction, and in case of a deficiency charge the grantee with the amount thereof. None of these covenants was in the deed to Lindsley of 1852, under which the plaintiff claims title. The effect of inserting such covenants in the deed of 1852 would be to practically nullify the conveyance, for the width of the street which with the pier was attempted to be conveyed would at the same time be excepted from the operation of the deed (Langdon v. Mayor, 93 N. Y., 129). Further, by the Act of 1837 that part of Forty-third street between the easterly side of Twelfth avenue and Thirteenth avenue, upon a portion of which the old pier was constructed, was reserved for public use, and under the ordinance title to the premises described in the

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deed of 1852 could not be conveyed (see Consolidated Ice Co. v. Mayor, 53 App. Div. 260, aff'd 166 N. Y. 92).

But independent of the ordinance the plaintiff failed to establish title to the pier or the land upon which it stands. As far as the extension to the pier is concerned, the occupation was merely as a tenant at will or licensee of the city, and the acts complained of do not constitute a grievance cognizable in equity. As regards the original pier — a public pier — described in the deed to Lindsley in 1852, that pier as it existed prior to 1852, and the land under the same, are wholly within and part of Forty-third street, a public street of the city of New York, as established by law, and held by the city in trust for public use, and were part of such public street at the time of the alleged grant to Lindsley; and no city board, officer, department or local authority had power to convey the same in fee or otherwise. "A municipal corporation has no implied or incidental authority to alien or to dispose of, for its own benefit, property dedicated to or held by it in trust for the public use, or to extinguish the public uses in such property, nor is such property subject to the payment of the debts of the municipality" (2 Dill. Mun. Corp., 4th ed., sec. 650; Brooklyn Park Com. v. Armstrong, 45 N. Y., 234). As the Supreme Court of the United States said in Meriwether v. Garrett (102 U. S., at p. 513): "In its streets, wharves, cemeteries, hospitals, courthouses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses" (see also St. Vincent Asylum v. City of Troy, 76 N. Y., 108; Kane v. Elevated R. R. Co., 125 N. Y., 183).

The Langdon case (93 N. Y., 129), which the plaintiff claims is decisive of the rights asserted by it in this action, is materially different from this case. There the grant of lands under water, which was made in 1810, excepted the streets to be made on said lands by the grantee from the operation of the grant, and the act of the Legislature passed in 1798 provided (ch. 80, sec. 5) that it should be lawful for the city to direct piers to be sunk and completed at such distances and in such manner as it should deem proper in front of the streets and wharves, to be made at the expense of the proprietors of the lots lying opposite to the places

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where such piers should be directed to be sunk. And West street, the westerly line of which was the grantee's bulkhead, was the "permanent line" bounding the Hudson river on the east. Even if it be true that the Statute of 1798 referred to other streets than West and South streets, the confirmation by the Legislature (L. 1845, ch. 225) of the Municipal Ordinance of 1844, hereinbefore referred to, virtually repealed any portion of the act of 1798 which might be construed as allowing private individuals to construct piers on the extensions of streets beyond high-water mark. As plaintiff's grant was illegal and inoperative it necessarily follows that the right of wharfage claimed as incidental to the ownership of the pier also falls.

The plaintiff contends, however, that even if the conveyance of 1852 was void, it had, at the time of the commencement of the action, acquired title to the property in question by nearly forty years of adverse possession. I cannot agree with that contention, for the reason that the occupation of the premises by the plaintiff constituted a public nuisance (People v. Vanderbilt, 26 N. Y., 287), and the right to maintain a public nuisance cannot be acquired by prescription or adverse possession (1 Wood on Nuisances, 3d ed., pp. 40, 43; Burbank v. Fay, 65 N. Y., at p. 70).

But even if it should be assumed that plaintiff has title to the premises in question, it cannot procure injunctive relief in this action. Under the two deeds made by the city to Lindsley in 1850, over two years before he acquired title to the property occupied by plaintiff, there were conveyed to the grantee the lots under water extending from high-water mark (which at Forty-third street was east of Twelfth avenue) on the east to the west line of Thirteenth avenue on the west, and from the centre line of Forty-third street on the north to the centre line of Forty-second street on the south, so much of the streets and avenues as fell within the boundaries being excepted. As pointed out by Judge Freedman in his opinion in the prior action (48 N. Y. Super. Ct., at p. 499), the deed of 1852 conveyed no easements over any of the property granted in 1850, and such easements could, under the circumstances, not be created until after the ownership of both the pier and adjoining water lots vested in Lindsley in 1852. As title to all of the property subsequently vested in John La Farge, the grant by his devisees of the pier, before they parted with the water lots conveyed in 1850, burdened those lots with an easement over

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the water south of the pier for a reasonable distance for access to the pier; so that merely as between the plaintiff and the defendant railroad the latter cannot lawfully do any act which would impair such easement. But under the covenants made with the city by Lindsley, the defendant company is obliged, when so required, to build sufficient wharves and bulkheads and fill in such parts of Forty-second and Forty-third streets and Twelfth and Thirteenth avenues as fell within the premises described and excepted, and plaintiff's title is subject to the performance of those covenants, although such performance would destroy plaintiff's easements.

It is true that prior to this action no resolution was passed by the dock department requiring the defendant railroad to construct the streets and avenues included within the bounds of its water lots. There was, however, such a resolution requiring said defendant to construct a bulkhead in front of its water lots between the southerly side of Forty-third street and the south side of Forty-second street, and it seems to me that the defendant railroad had a right, at the direction of the city, to construct such a bulkhead upon its own land; for, although as a matter of fact such bulkhead would inure to the railroad company's benefit and destroy plaintiff's easement south of the old pier, its construction was required by the Legislature; its primary object was the carrying out of a great public improvement, and, though the bulkhead designed may possibly be not such a one as is contemplated by the covenants, the effect of such construction is exactly the same as if the railroad company filled in the streets under the stipulations in the deeds of 1850. The river front must be improved by the construction of the bulkheads, and whether between Forty-second and Forty-third streets the improvement is made with the consent of the defendant railroad company or against its strenuous objection, is, under the circumstances, a matter which concerns the defendants only.

There must be judgment for defendants.

Judgment for defendants.

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BERTHOLD VEIT and LEO VEIT, Copartners, Doing Business Under the Firm Name of B. & L. VEIT, Plaintiffs, *v.* JOHN H. COLLINS and ADOLPH FRIEDMAN, Defendants.

(Supreme Court, New York Special Term, October, 1902.)

Injunction — Refused, in a common law action for money only, against a fraudulent transferee of the vendee — Effect of L. 1902, ch. 528, § 1 — Code C. P., § 603 — Receiver.

In a common law action brought by a general creditor to recover a sum of money only, he cannot, upon allegations that his defendant debtor fraudulently disposed of his merchandise in bulk to the other defendant with a view to hinder, delay and defraud the debtor's creditors, that that defendant purchased with a like intent, and that the debtor has left the State of New York and cannot be found, procure under Code C. P., § 603, a continuance of a temporary injunction restraining the said transferee from disposing of the property transferred, as that section of the Code applies only to equitable actions or to actions triable by the court. He is not entitled to a receiver of said property.

The procedure in such a matter has not been changed by L. 1902, ch. 528, § 1, making fraudulent and void as against creditors of the seller sales of merchandise made by him in bulk.

MOTION to continue temporary injunction.

Peckham, Warner & Strong, for motion.

Epstein Brothers, opposed.

STECKLER, J. The complaint sets out two causes of action against the defendant Collins — the first for goods sold and delivered to him, and the second upon a promissory note made by said defendant to the order of the plaintiffs. As a part of the first cause of action there are allegations upon information and belief tending to show that prior to the beginning of the suit the defendant Collins fraudulently disposed of his merchandise, in bulk, to the defendant Friedman with intent to hinder, delay and defraud

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Collins' creditors; that the purchase by the alleged vendee was made with like intent, and that Collins has departed from the State and cannot be found.

Upon the complaint and affidavits plaintiffs obtained an order restraining defendant Friedman from disposing of the property; and this motion is to continue the temporary injunction *pendente lite* and for the appointment of a receiver of the said property.

The plaintiffs base their right to the relief asked mainly on chapter 528 of the Laws of 1902, which provides as follows: "Sec. 1. A sale of any portion of a stock of merchandise other than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall at least five days before the sale make a full and detailed inventory showing the quantity, and, so far as possible with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless such purchaser shall at least five days before the sale in good faith make full, explicit inquiry of the seller as to the name and place of residence or place of business of each and every creditor of the seller and the amount owing each creditor, and unless the purchaser shall, at least five days before the sale in good faith notify or cause to be notified personally or by registered mail each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge, of such proposed sale and of the stated cost price of merchandise to be sold and of the price proposed to be paid therefor by the purchaser. The seller shall, at least five days before such sales file a truthful answer in writing of each and all of said inquiries."

While under this statute a finding that the transfer to the defendant Friedman was fraudulent and void may be warranted, that is not the question presented on the motion. The question is whether the defendant Friedman can be enjoined from disposing of the property now in his possession, and for the determination of that question an examination of the Code provisions is necessary.

Where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff, an injunction order may be granted to

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restrain it. In such case the right to the injunction depends upon the nature of the action. (Code Civ. Pro., sec. 603.) The plaintiffs assert that this provision entitles them to the relief sought. When the right to an injunction does not depend upon the nature of the action, but depends upon extrinsic facts, an injunction order may be granted where it appears by affidavit either that the defendant during the pendency of the action is doing, or procuring or suffering to be done, or threatens or is about to do or procure, or suffer to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual; or that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff (Code, sec. 604). As the acts of the defendants were done before the beginning of the suit, it is not claimed that the section last cited is applicable to this controversy.

These provisions of the present Code are in substance the same as those of section 219 of the Code of Procedure, clause 1 of said section corresponding to section 603 of the Code of Civil Procedure, and clauses 2 and 3 of that section corresponding with section 604 of the present act.

In Malcolm v. Miller (6 How. Pr., 456), which was an action against a vendee for goods sold, such vendee before suit brought having disposed of the property to his co-defendant, who had knowledge of the fraud, and both defendants being insolvent, it was held that the vendor could obtain an injunction pending the litigation restraining a disposition of the property of the defendants; and the decision was based upon clause first of section 219 of the former Code. In Mott v. Dunn (10 How. Pr., 225) the plaintiffs, who were simple contract creditors, sued the debtors, then insolvent, and their alleged fraudulent assignees, and it was held that plaintiffs were, pending the action, entitled to an injunction restraining a disposition of the property, and that they were also entitled to have a receiver appointed.

But the Court of Appeals, in Reubens v. Joel (13 N. Y., 488), subsequently laid down a contrary doctrine. That was an action upon promissory notes made and executed to the plaintiff. It was alleged in the complaint that the makers had made a fraudulent assignment of their property to their co-defendant with intent to hinder, delay and defraud the plaintiff and other creditors, in which

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fraudulent design the assignee participated; and plaintiff prayed for an injunction restraining a disposition of the assigned property. The assignee demurred to the complaint, and the demurrer was sustained; and the Court of Appeals held that an injunction in such case was unauthorized. Judge Selden, in his opinion (at p. 499), said that clause 1 of section 219 of the former Code applied solely to equitable actions, or actions triable by the court, and it seems to me that the same remark is applicable to section 603 of the present Code, the provision upon which the plaintiffs rely (People v. Canal Board, 55 N. Y., 390; Clark v. King & Bro. Pub. Co., 40 App. Div., 405). This is not an equitable action or one triable by the court. It is an action to recover a sum of money only — a common-law action — and facts are stated in the complaint in an attempt, on the plaintiffs' theory, to comply with the statutory provision (Code, sec. 603), that the complaint, where an injunction is sought by reason of acts done before suit brought, must show the acts upon which the right to injunctive relief is based.

In the absence of a contrary statute or adjudication the Reubens case must be regarded as decisive of the motion. I have been unable to find any authoritative adjudication modifying the doctrine of the case cited, and I do not agree with the plaintiffs' contention that the statute passed this year changes the procedure. The act states that unless the conditions therein prescribed are complied with the sale of an entire stock of merchandise in bulk shall be fraudulent and void as against the creditors of the seller. It is well settled that although a statute may by its terms protect creditors from the fraud of debtors, a creditor at large cannot assail an assignment or other transfer of property by the debtor as fraudulent against creditors; that he must first establish his debt by the judgment of a court of competent jurisdiction, and either acquire a lien upon the specific property or be in a situation to perfect a lien thereon, and subject it to the payment of his judgment upon the removal of the obstacle presented by the fraudulent assignment or transfer (Southard v. Benner, 72 N. Y., 424), and the same rule applies to void transfers made by the debtor (Sheldon v. Wickham, 161 N. Y., 500; Niagara County Natl. Bank v. Lord, 33 Hun, 557). Except in a case under the Act of 1858 (the provisions of which are now incorporated in the Personal Property Law of 1897), where an assignee, trustee or the like may bring an action to set aside fraudulent conveyances, such is the procedure applicable in connection

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with statutes characterizing certain acts of a debtor as fraudulent (2 R. S., 136, sec. 5) or void (L. 1833, ch. 279, sec. 1); and I cannot conceive how a new statute, which, under certain circumstances, brands the sale of merchandise in bulk as fraudulent and void, changes existing procedure.

If the plaintiffs had attached the property instead of attempting to enjoin its disposition by the defendant Friedman, they would have reached the same result which they now seek to accomplish by the injunction asked for (Code Civ. Pro., sec. 636, subd. 2; Rinchey v. Stryker, 28 N. Y., 45; Karst v. Gane, 136 id., 316).

Entertaining the view that an injunction cannot be granted, I do not think that in this case the court would be justified in appointing a receiver of the assigned property.

Motion to continue injunction and for receiver denied.

Motion denicd.

NATHANIEL WHITMAN, GEORGE H. DUNHAM, ARTHUR L. LESHER and RAYMOND LESHER, Plaintiffs, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Special Term, October, 1902.)

New York city — Grant of lands under water at the foot of 90th and 91st streets, East river — Exception of "Exterior Street" — Name of the water at the foot of said streets — Covenant authorizing the city to control the improvement of "Exterior Street" — Implied reservation to it of an easement to reach its bulkhead.

Where the city of New York grants in 1869 lands under water on the east side of Manhattan island between 90th and 91st streets, designates a part of the lands, upon a map attached to the deed, as "Exterior Street" and excepts from the grant so much of the premises as form a part of any street in use or that "may now or hereafter be assigned, designated or laid out through said premises according to law", the city retains absolute title, as against a mesne grantee of its grantee, to so much of the premises as are comprised in "Exterior Street" whether or not that street was then laid out "according to law."

***Semble*, that the water at the foot of said streets is not the Harlem river but is the East river or Sound.**

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Where the city's deed bound its grantee, his heirs and assigns, not to construct, without its permission, on the premises excepted, any wharves, bulkheads, avenues or streets or build any wharf or pier in the river in front of the premises granted, the city can prevent any improvement of the space designated as "Exterior Street" from being made without its permission; and where the deed also excepted and reserved the wharfage from the bulkhead in front of 90th and 91st streets, the city impliedly reserves to itself an easement over the granted premises, for a reasonable distance north of 90th and south of 91st street, for its access to its said bulkhead.

ACTION for the determination of a claim to a piece of land situate in the city of New York.

The nature of the action and material facts are stated in the opinion.

Carter, Hughes & Dwight (Charles E. Hughes and Arthur C. Rounds, of counsel), for plaintiffs.

George L. Rives, Corporation Counsel (Theodore Connoly and Edwin J. Freedman, of counsel), for defendant.

STECKLER, J. This action is for the determination of a claim made by the defendant to a piece of land bounded northerly by the southerly side of East Ninety-first street; easterly by the bulkhead line established by the harbor commissioners, pursuant to chap. 763 of the Laws of 1857; southerly by the northerly side of East Ninetieth street, and westerly by a line drawn parallel with and distant seventy feet westerly from the said bulkhead line; and also of a claim made by said defendant to control improvement of plaintiffs' adjoining premises, and to the enjoyment of certain easements in connection with defendant's wharf property at the foot of each of said streets (Code, secs. 1638–1650).

The parcel referred to was originally land under water, and formed the easterly portion of premises included in a description of property conveyed by the mayor, aldermen and commonalty of the city of New York, April 7, 1869, to John L. Brown, plaintiffs' predecessor in title. Upon the map attached to the deed the said parcel was designated as "Exterior Street," and the water to the immediate east of the parcel was designated "Harlem River."

The deed, which contains most, if not all, of the covenants ordi-

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narily inserted by the municipality in grants of land under water, contained the following clause: "Saving and reserving out of the hereby granted premises so much thereof as may form part of any street or streets, avenue or avenues, road or roads, bridge or bridges, that may now or hereafter be assigned, designated, or laid out through said premises according to law for the uses and purposes of public streets, avenues, and highways as hereinafter mentioned, or which are now in use as such."

All the land between high and low-water mark around the Island of Manhattan was, by the Dongan Charter, in 1686, granted to the city of New York, and pursuant to the act of the Legislature of 1826 (chap. 58), supplementing the provisions of the Montgomerie Charter and the act of 1807, the land commissioners, in 1826, granted to the city all the land covered with water along the westerly shore of the East river, or sound, contiguous to and adjoining the lands of the city at low-water mark, and extending 400 feet into the river or sound, from a point on the westerly shore of said river, or sound, two miles north from Corlear's Hook, and extending therefrom north along the westerly shore of the East river or sound to Spuyten Duyvil Creek, otherwise called Harlem River. Chapter 285 of the Laws of 1852 authorized the city to lay out and fix a permanent exterior street "along the shore of the Harlem river in the city of New York, between the East river or sound, and the North or Hudson River;" and granted to the municipality all the right and title of the people of the State to the lands covered with water along the shore of the Harlem river, from the East river or sound to the North or Hudson river, and extending from low-water mark to and including the said exterior street or permanent line. Under the statute, said Exterior street had, in 1859, prior to the grant to Brown, been laid out by the city, and, from the proceedings had by the municipal authorities, it appears that the said street was laid out from Eighty-sixth street to the Hudson river at Spuyten Duyvil Creek.

If the river northward from East Ninetieth street was the Harlem river in 1852, the city is clearly entitled to that part of the premises designated on the map annexed to the Brown deed as Exterior street; for that strip, under the authorities, was excepted from the land conveyed; so that the city retained title to the strip and never divested itself of such title (Mayor v. N. Y. C. & H. R. R. R. Co., 69 Hun, 324; Consolidated Ice Co. v. Mayor, 53 App.

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Div. 260; aff'd. 166 N. Y. 92; Langdon v. Mayor, 93 N. Y. 149). The plaintiffs contend that the river at the point in question is and was the East river, or the sound; that the city had no authority to designate or lay out a street there, and that, therefore, the exception in the deed was ineffective.

I think the preponderance of evidence shows that the river at the premises in question is not the Harlem river within the meaning of the act of 1852; for nearly all the ancient deeds and maps of the upland from 1787 to 1866 describe the upland between Ninetieth and Ninety-first streets as situated upon the East river or sound. And, before and subsequent to 1852, acts of the Legislature speak of the river at the place in question as the East river or sound.

It remains to be considered whether, independent of the statute of 1852, the municipality, by their proceedings in 1859, assigned, designated, or laid out a street according to law at the eastern extremity of the premises thereafter conveyed to Brown.

By chap. 80 of the Laws of 1798, the State authorized the city to lay out and adopt an exterior street along the East river or sound, and along the North or Hudson river, and, as the city increased in size, to extend such streets so laid out, and that act was substantially re-enacted in 1801 (chap. 129, sec. 3), and again in 1813 (chap. 86, sec. 120). But it seems to have been assumed that those acts were limited in their scope to South street and West street (Langdon v. Mayor, 93 N. Y., at p. 135; L. 1828, chap. 149; L. 1860, chap. 368; L. 1887, chap. 697), and, even if my views were otherwise, I would not feel disposed to disturb that assumption.

Nevertheless, I am inclined to think that, as between the city and plaintiffs' predecessor in title, at least, the city had a right to assign or designate, according to law, a portion of its own property for the uses and purposes of a public street, and that the exception of such part of the premises, which was plainly marked on the map annexed to Brown's deed, was sufficiently definite to keep the title thereto in the city (See Consolidated Ice Co. v. Mayor, 166 N. Y., at p. 99; Smith v. Furbish, 68 N. H. 123). And, even if the plaintiffs' contention, that at the time of the granting of the premises the exterior street was not assigned, designated or laid out "according to law," were correct, it is possible for the proper authorities at any time hereafter to assign, designate or lay

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out such exterior street as is indicated on the map annexed to Brown's deed, whereupon the exception would become operative; for the language of the deed is "saving and reserving * * * so much thereof as may form part of any street * * * that may now or hereafter be assigned, designated or laid out through said premises according to law," etc.

The city's claim to said strip, described as "Exterior Street," must therefore be sustained.

The defendant's second claim is that it is entitled to an easement of access to its pier and right of navigation over the premises, and also to forbid the improvement of said premises until permission is first had and obtained.

Brown's deed contains the following covenant: "And it is hereby further covenanted and agreed by and between the parties to these presents, and the true intent and meaning hereof is, that the said party of the second part, his heirs and assigns, will not build the said wharves, bulkheads, avenues or streets, hereinbefore mentioned, or any part thereof, to make the land in conformity with the covenants herein mentioned, until permission for that purpose shall be first had and obtained from the said parties of the first part or their successors, and will not build or erect, or cause to be built or erected, any wharf or pier or any other obstruction in the Harlem River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first for that purpose."

It seems to me that the covenant clearly expresses the meaning of the deed to be that the grantee would not build on the land excepted from the operation of the deed without the city's permission, and that, as the wharves and bulkheads were, if at all constructed, to be built on the part excepted, the grant of wharfage was conditioned upon the grantee and his assigns first obtaining permission from the city to build Exterior street on the easterly side of the premises. As no such permission has been given by the city, the doctrine of Langdon v. Mayor (93 N. Y., 129) is inapplicable. Plaintiffs, however, can improve their own property, that is, all of the land with the exception of the 70-foot strip assigned for Exterior street, as they please, subject to any proper regulations of Congress or the dock department.

The deed to Brown excepted wharfage to accrue from the end of the bulkhead in front of Ninetieth and Ninety-first streets, which

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wharfage was reserved to the city. Under this covenant, I think that there was an implied reservation of an easement over plaintiffs' premises for a reasonable distance north of Ninetieth street and south of Ninety-first street for access to defendant's bulkhead or pier at the foot of each of those streets (Langdon v. Mayor, *supra;* Knickerbocker Ice Co. v. Forty-second Street, &c., R.R. 48 N. Y. Super. Ct. 489).

Submit decision and judgment in accordance with these views.

Judgment accordingly.

ARTHUR L. FOSTER and HARRY R. HINMAN, Plaintiffs, *v.* THE RETAIL CLERKS' INTERNATIONAL PROTECTIVE ASSOCIATION, JOHN R. O'BRIEN, Its President; THE TRADES ASSEMBLY OF SYRACUSE; JOHN M. HILSDORF, GEORGE SOBEL, CARL HEIST, BERT LIND and CHARLES LAVINE, Defendants.

(Supreme Court, Onondaga Special Term, October, 1902.)

Labor union — Legality of picketing a store — Motive — Conspiracy — Acts restrained — Use of verified complaint on a motion for an injunction.

Acts, of sympathizers with labor unions, consisting in picketing a store declared "unfair" by the unions, circulating near it printed cards asking union men to keep away from it, and endeavoring to keep them and the public away by persuasion and peaceable means only, are not illegal and the further commission of such acts will not be enjoined at the suit of the proprietors of the store.

The motive with which the sympathizers did these acts is not material nor are the acts made illegal by the fact that a number of persons cooperated in them by agreement.

The court however enjoined so many of the defendants, as had been served with an order to show cause why a temporary injunction should not be granted, their servants, agents, coadjutors and assistants, from entering the store for the purpose of interfering with trade or customers, from interfering, from obstructing access to it by any physical means, from so acting as to collect in front or adjacent to it crowds calculated to obstruct travel upon the streets or sidewalks near it, and from using threats, violence or intimidation with the intent of preventing travelers or intending customers from entering the store and trading there.

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Where a verified complaint, instead of an affidavit, is used on a motion for an injunction, there can be taken to be true only positive allegations therein and those made on information and belief where the sources of the information and the grounds of the belief are given.

ORDER to show cause why a temporary injunction should not be granted.

William Kennedy, for motion.

Wilson, Cobb & Ryan, opposed.

ANDREWS, W. S., J. An order was heretofore granted that the defendants show cause why they should not be enjoined during the pendency of the action from picketing the plaintiffs' store; from publishing or circulating a certain card declaring the plaintiffs unfair, and other similar printed matter; from in any way or by any means, overt in character, interfering with their business or with persons who would be likely to trade with them, and from doing any act in the vicinity of their premises whereby travel upon the sidewalk or street adjacent thereto should be interrupted.

This order, and the papers upon which it was granted, were served in due time upon the defendants Lind and Lavine, and they appeared on the day specified therein. No service was made upon any of the other defendants and as to them the proceeding is dismissed.

In disposing of the motion, in so far as it affects the defendants Lind and Lavine, it is necessary to determine the facts established by the papers before me. For this purpose while a verified complaint may be treated as an affidavit on a motion for an injunction, its evidential force must be tested by the same rule that is applied to other affidavits. Only positive allegations and allegations on information and belief where the source of the information and the grounds of the belief are given, can be taken as true. Clark v. King & Brother Pub. Co., 40 App. Div. 405.

So, too, epithets are not facts. The question is not whether an affidavit designates a certain act as a threat, or as intimidation, as a conspiracy or as malicious that is important, but whether the facts stated show that the act deserves such a designation. National Protective Assn. v. Cumming, 170 N. Y. 315.

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It appears that the plaintiffs are copartners in the clothing business under the firm name of Foster, Hinman & Co. Their store is at the northwest corner of South Salina and Fayette streets in the city of Syracuse. They have a valuable stock of goods and have a large number of clerks and salesmen, who, apparently, have been satisfied in the past and have been content with their work, the condition under which it has been performed and their wages.

There exists in the city of Syracuse an unincorporated association known as the Retail Clerks' Local Union No. 243. It is a branch of the Retail Clerks' International Protective Association, also an unincorporated body, of which Mr. John R. O'Brien is president. The object of the association is to improve the condition of its members as to wages and hours of work and other matters. The local union is affiliated with the Central Trades and Labor Assembly of Syracuse. This association is also unincorporated and its object is to promote the general interests of laboring men.

It was claimed that the plaintiffs did not conform to the custom generally existing as to the hours of opening and closing their store. Their own clerks do not seem to have made objection, but in June, 1902, an agent of the Retail Clerks' Local Union called upon them and endeavored to obtain an agreement with them in this regard. He failed. Thereupon the local union passed a resolution declaring the plaintiffs unfair and referred the matter to the Central Trades and Labor Assembly. The latter body indorsed this action, provided that a grievance committee then appointed should fail to make a satisfactory settlement. This committee interviewed the plaintiffs and tried to induce them to sign an agreement containing various provisions as to wages and working hours, but this the plaintiffs refused to do. Thereupon the Retail Clerks' Local Union caused the store to be picketed and printed cards were provided for distribution. These cards were in the following form:

"UNFAIR.

"FOSTER, HINMAN & COMPANY.

"Kirk Block, have been declared unfair by the Retail Clerks' Local Union 243 and this action has been indorsed by the Trades Assembly. Union men keep away."

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Just what was done subsequently is in dispute. The defendants admit that they stationed themselves in front of or near the plaintiffs' store and attempted to persuade passers-by not to patronize the plaintiffs. They say this was done quietly, without intimidation, without threats, without collecting crowds or entering upon the plaintiffs' premises. This they say they have a right to do. They further deny the existence of any conspiracy.

The plaintiffs, on the other hand, claim not only that there was such picketing as has been stated, but that it was accompanied by threats, by intimidation, by force, by the collection of crowds in such manner as to impede access to their store, and by the entry of defendants upon their premises for the purpose of interfering with customers. All this they say was the result of a conspiracy among the defendants and has caused them great loss.

The defendants named in the complaint are the Retail Clerks' International Protective Association, John R. O'Brien, its president, the Trades Assembly of Syracuse, John M. Hilsdorf, George Sobel, Carl Heist, Bert Lind, and Charles Lavine. As has been said, none was served with papers herein except the last two and no injunction in any event will be granted against the others. But this fact does not necessarily prevent the consideration of their acts. If wrongful acts have been committed by others and these acts were the result of a conspiracy in which Lind and Lavine joined, they are responsible therefor. Rourke v. Elk Drug Co., 75 App. Div. 145.

As to the Retail Clerks' International Protective Association and its president, O'Brien, there is clearly no sufficient evidence of their connection with the matter.

But Lavine, Lind, Hilsdorf, and Sobel concededly were engaged in picketing the store. Heist makes no denial that he was engaged in the same work. In view of all the papers — the denials and their form as well as the charges — it must be held that whatever any of them did was done as the result of a preconceived design and agreement. If what they did was wrongful, they conspired together to do this wrong.

The fact of picketing and the fact of the publication and distribution of the card that has been referred to being admitted, the dispute is as to the other allegations. Just how far Lavine, Lind, Hilsdorf, Sobel, and Heist went in the execution of their project is in considerable doubt, and I shall not attempt to de-

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termine here definitely just what the truth may be. This much is clear, however. Whatever may be said of simple picketing where only persuasion is used, certain things cannot have been done without infringing the rights of the plaintiffs. The defendants have no right to enter upon their premises except for the *bona fide* purposes of trade. If they do they are trespassers. If the plaintiffs own to the center of the street the defendants have no right to station themselves in front of their store and there distribute circulars such as the one in question. If they do this they are also trespassers. Adams v. Rivers, 11 Barb. 390. The defendants have no right to obstruct access to the store in question. If they do they commit a nuisance. The defendants have no right to so act as to collect crowds and thus obstruct movement along the sidewalk at or in the neighborhood of the store. This is likewise a nuisance. The defendants have no right to use force or violence, or threats or intimidation for the purpose of preventing passers-by on the highway from entering the store and trading with the plaintiffs.

It should be remembered in this connection that to constitute intimidation it is not necessary that there should be any direct threat, still less any actual act of violence. It is enough if the mere attitude assumed by the defendants is intimidating. And this may be shown by all the circumstances of the case, by the methods of the defendants, their circulars, their numbers, their devices. People v. Wilzig, 4 N. Y. Crim. 403; People v. Kostka, id. 429.

Such acts being illegal, an agreement to accomplish them is an illegal conspiracy, and where they are continuous and repeated and are injurious to a third party their continuance will be enjoined by a court of equity.

As has been said, it is not at all certain as to just what the defendants have done. They deny that they have done any of these acts and, as I understand it, disclaim the right to commit them. But in a case like the present the rule which they invoke that when all the equities of a complaint are denied in the answer an injunction will not be granted *pendente lite* does not apply. It only applies when the litigants claim adversely in respect to property, or the right to do some act in connection therewith, and the asserted right of the plaintiffs seems doubtful. The defendants Lavine and Lind cannot be harmed if they are enjoined from

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doing what they have no right to do, and, moreover, from doing what they say they have not done and do not desire to do.

A most serious and interesting question arises, however, when it is sought to enjoin the defendants from simply picketing the store in question. That is, do they commit any wrong upon the plaintiffs when they combine with others peaceably, by persuasion only, to induce persons upon the street to refrain from trading with the plaintiffs? It must first be determined whether such an act on the part of an individual is illegal.

At the very threshold of the case we meet a difficult question which has been discussed indeed in Rogers v. Evarts, 17 N. Y. Supp. 264, and National Protective Association v. Cumming, 170 N. Y. 315, but which has, so far as I know, never been decided in this State.

It is a truism that there are many acts which directly injure the property of another, yet which do not give rise to a cause of action. The phrase *damnum absque injuria* was invented to meet such cases. A, may make such erections upon his land as he chooses, notwithstanding the consequent injury to his neighbor. B, may by fierce and continuous competition ruin a business rival. C, may advise his friend to patronize one physician rather than another. Of course all these matters have their limits. If A goes too far, he may create a nuisance. If B's competition is too strenuous he may be guilty of fraud. If C says too much, he may become liable for slander. In the last analysis this freedom to commit injury and the bounds imposed upon it are regulated by what has been thought to be public policy. The injury itself is never good, but to suffer it may entail less evil than to attempt to check it by legal means. On the whole it may be best that A should be given great freedom in the management of his property. It may be best that there should be allowed the widest possible competition between B and his competitors. The freedom of C to advise or persuade, perhaps, should not be restricted.

But does it ever happen that the intent with which A or B or C act is an element which differentiates what they may from what they may not do? Concededly it does not in the case of A and B. But it has been sometimes said that in the class of cases represented by C it does so; that if C advises or persuades his friend for the purpose of benefiting one or the other his act is rightful; if simply for the purpose of injuring the physician it is illegal;

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if C has an interest to serve in giving his advice he has a right to give it, if not he has none.

Judge Oliver Wendell Holmes has put this view in the strongest form in an article in 8 Harvard Law Review, page 1, and also in his dissenting opinion in Vegelahn v. Guntner, 167 Mass. 92, and in Plant v. Woods, 176 id. 492. His position is that intentional injury inflicted upon another is *prima facie* wrongful. It may, however, be sometimes justified on grounds of public policy, and in rare cases whether it shall or shall not be justified may depend on the intent with which the act is done.

All admit that this would be an exception to the general rule. That rule clearly is that the law does not take into account motive as constituting an element of civil wrong. But there are exceptions. Malicious prosecution (Clerk & Lindsell Torts, 2d ed. 527); slander and libel in cases where privilege exists; actions by husband against one who harbors a wife (id. 190); or by a master against one who harbors a servant (id. 185), and actions for slander of title (id. 548), all depend on intent.

Why they should so depend it may be difficult to explain. But in Allen v. Flood, L. R. (App. Cas. 1898), 1, it is said that in each the basis of an action is the doing of an act which the law already regards as illegal, but that the doer of the act is protected from its usual consequences in the event that he was actuated by an honest desire to perform a public or private duty. This is said in answer to an argument in favor of a position similar to that assumed by Judge Holmes, but it would rather strengthen his position by showing that cases more or less analogous exist.

It seems to me, however, that the fault contained in the proposition lies in the assumption with which it starts. Is there any reason for saying that intentional injury to another is always, as a matter of fact, wrongful? Shall we say, for instance, as Judge Holmes does, that one who builds a spite fence upon his property commits a legal wrong *prima facie,* but that he is justified because he is the owner of the property and public policy requires that he should have a free hand? If this be so what would happen if the spite fence was erected by a mere trespasser? Would he be liable not only to the owner of the land for his trespass but to the neighbor for the injury caused by the fence? Are not the supporters of this doctrine struck by the malicious and unreasonable character of many injuries for which the law heretofore has

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afforded no redress, and do they not seek to cover them by extending the doctrine of intent beyond the few and the exceptional cases in which it had hitherto received recognition?

The truth in such questions can be answered only by the use of the historical method. Our law is not a philosophical system. It is a growth, having its origin in the customs and usages of half barbarous tribes. At first declaring few rights and possessed of fewer remedies, it became with the advance of civilization more detailed and complex. Forced by the needs of the time, influenced by the theories of the Roman law, led by reasoning from one position to another, seeking to enforce the public good and the public welfare, courts and Legislatures have gradually built up the system as it to-day exists. And as is necessarily the case with such a past the result is not always perfect. The logic is sometimes defective. The views of public policy adopted are not always so wise and so broad as to meet the requirements of to-day. It is a mistaken idea to assume that because a rule should be so, therefore it is. It is, if our predecessors have adopted it.

Practically it is better to remember the old definition that malice in its legal sense "means a wrongful act done intentionally without just cause or excuse," and to limit the theory of intent as an element of civil wrong to those instances where it has been enforced in the past.

As is said by Lord Watson in Allen v. Flood, otherwise, "One who committed an act not in itself illegal but attended with consequences detrimental to several other persons would incur liability to those of them whom it was proved that he intended to injure and the rest of them would have no remedy."

It would always be a question of fact for the jury whether an act otherwise legal was committed with an evil intent. The step should not be taken unless justified by clear weight of authority, and I am not willing to hold that a request not to patronize a certain dealer may be legal if made by a person in one state of mind or holding one relation to him and illegal in another.

The decision of this question becomes necessary for the determination of the case at bar because neither Lavine nor Lind are or were employees of the plaintiffs. Neither are they members of the clerks' union, and so personally interested in the lot of the retail clerks. They both belong to the Boot and Shoe Workers' Union, and the utmost, apparently, that can be said is, that as

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working-men they sympathize with the efforts of fellow workmen of a different class and engaged in a different occupation to improve their condition. They have not sufficient interest in the result to justify their act if their act requires justification. Their interest is too remote and too uncertain.

It becomes a question, therefore, whether or not, apart from the question of motive, picketing is in itself illegal, and upon this question the courts in the various States in this country and the courts in England have widely differed. Some have said that picketing in itself constituted a threat and intimidation and is, therefore, unlawful. Others that a man has a right to conduct his business in the way that pleases him best, without obstruction or molestation, and that an attempt by picketing to compel him to agree to this or that demand is an unlawful interference with this right and, therefore, should be stopped.

I do not agree with either of these contentions. There is nothing in a mere request not to deal which implies a threat to do an unlawful injury. Whether it does or does not depends on the circumstances of each case — upon what is said and how it is said.

Nor is there any legal rule which holds that I may not request my family not to trade with A or B for any reason that seems to me good, however petty and insufficient the reason may seem to others. I have the right to make the same request of a relative or friends and I have the equal right to make the request of strangers by word of mouth or in writing. Nor is the place where I make the request important. If I make it to one just entering A's store the loss to A is more obvious, though no greater, than if I make it to an intending customer a mile away.

To quote the statement of Lord Davey in Allen v. Flood, "I do not doubt that everyone has a right to pursue his trade or employment without molestation or obstruction if these terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that everyone has the right to do any lawful act he pleases without molestation or obstruction. But if it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment and needs to be excused or justified, I say that such a proposition in my opinion has no solid foundation in reason to rest upon."

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Mere picketing, therefore, if it is peaceful, if there is no threat or intimidation, if it is confined to simple persuasion, I do not regard in any sense as unlawful, whatever may be the motive of the picketers.

Finally, assuming that picketing by an individual is lawful, does it become unlawful because done as the result of an agreement between two or more? Many courts, and courts entitled to the greatest respect, have held that it does. But the reasoning upon which such a conclusion is based seems unsatisfactory. By some it is said that the reason is that the combined acts of several are likely to be more harmful than the act of one. "A man may encounter the acts of a single person, yet not be fairly matched against several." But why should this consideration convert a right into a wrong. It may affect the remedy. It may justify, for instance, an injunction to protect against a conspiracy to libel, notwithstanding the rule that a libel by an individual may not be enjoined. It can hardly do more. Others have said that the reason is based upon the maxim *de minimis non curat lex*. The injury done by one is so small that the law will not regard it. But is that so? Is the injury done by one necessarily, and this is the test, so trivial that it need not be recognized by the courts? Might not a man of great influence conceivably work much more harm than a combination of others less well known?

The whole theory is, I think, erroneous. A conspiracy is an agreement to do an unlawful act or to do a lawful act by unlawful means. There can be no conspiracy if the act aimed at is lawful and if the means employed also are lawful. Two or more persons may agree to do what each one of them may lawfully do. "What one may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be lawful, the combination of many to commit it may aggravate the injury but cannot change the character of the act." Bohn Mfg. Co. v. Hollis, 54 Minn. 223.

The following cases in this State give more or less support to the views stated in this opinion: Levy v. Rosenstein, 66 N. Y. Supp. 101; Krebs v. Rosenstein, 31 Misc. Rep. 661; Cohen v.

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United Garment Workers, 35 id. 748; Rogers v. Evarts, 17 N. Y. Supp. 264; Johnston Harvester Co. v. Meinhardt, 9 Abb. N. C. 393; People v. Wilzig, 4 N. Y. Crim. 403; People v. Kostka, id. 429; Beattie v. Callanan, 67 App. Div. 14; Davis v. Zimmerman, 91 Hun, 489; Sinsheimer v. United Garment Workers, 77 id. 215; Sun Printing & Pub. Assn. v. Delaney, 48 App. Div. 623; National Protective Association v. Cumming, 170 N. Y. 227. Even in this State, however, the cases are far from unanimous. In Gilbert v. Mickle, 4 Sandf. Ch. 357, the vice chancellor restrained the defendant from causing a placard warning the public to beware of mock auctions, to be paraded or posted in the public streets adjacent to the premises of the plaintiff who was an auctioneer. He conceded that the sidewalks were not blocked and that no crowds were collected, but he held that the defendant's acts constituted a nuisance. In view of the law of nuisance, as now developed, this position could probably not be maintained today. There is also a class of cases of which Davenport v. Walker, 57 App. Div. 221; Davis v. United Engineers, 28 id. 396; People ex rel. Gill v. Walsh, 15 N. Y. St. Repr. 17; Connell v. Staiker, 20 Misc. Rep. 423; Gill v. Smith, 5 N. Y. Crim. 513, and, finally, Curran v. Galen, 152 N. Y. 53, are examples. They hold that an attempt to coerce other workmen to join an association under penalty of loss of their position and loss of employment is illegal. In so far as "coercion" means simply persuasion addressed to employers and refusal to work with nonunion men these cases are overruled by National Protective Association v. Cumming, cited above. There is a second class of cases of which Dueber Watch Case Co. v. Howard Watch Co., 3 Misc. Rep. 582; People v. Duke, 19 id. 292; Rourke v. Elk Drug Co., 75 App. Div. 145, and Park & Sons Co. v. National Wholesale Druggists' Association, 30 Misc. Rep. 675, 50 N. Y. Supp. 1064, are examples. In all of these cases the acts of the defendants in refusing to deal with the plaintiff and preventing others from doing so were in pursuance of a conspiracy in restraint of trade, and, therefore, illegal. In regard to Master Stevedores' Association v. Walsh, 2 Daly, 1, it can only be said that the dictum of Judge Daly is not in accord with the current of authority. In People v. Barondess, 133 N. Y. 649, where the judgment of the General Term was reversed upon the dissenting opinion of Judge Daniels, 61 Hun, 571, an attempt

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was made to extort money by threats and fear. This was plainly illegal whether the threat was to do a legal or illegal act.

There will be no advantage in citing the English cases or the cases in the neighboring States. Every variety of views and doctrine can be found. Authority is abundant for almost every proposition. But it is believed that the views here expressed are in line with the authoritative decisions in the courts of this State.

An order may, therefore, be entered enjoining and restraining the defendants Lind and Lavine, their servants, agents, coadjutors, and assistants from entering upon the premises of the plaintiffs for the purpose of interfering with or interrupting their trade or customers or from in fact, while upon such premises, interrupting or interfering with such trade or customers; from obstructing access to the plaintiffs' store by any physical means; from so acting as to collect crowds in front of or adjacent to said store, which crowds shall obstruct travel upon the streets or sidewalks at or in the neighborhood thereof; and finally from the use of threats, violence, or intimidation with the intent of preventing travelers upon the highway or intending customers of the plaintiffs from entering the store of the plaintiffs or trading with them, or whereby such result is attained.

Ordered accordingly.

FRANK YULA, Plaintiff, *v.* THE NEW YORK & QUEENS COUNTY R. Co., Defendant.

(Supreme Court, Queens Trial Term, October, 1902.)

Evidence — When no adverse presumption arises from a failure to call a witness.

The failure of a railroad company to call as witnesses, upon the trial of an action brought against it by a passenger for injuries alleged to have been caused him by its negligence, certain other passengers who were in the car at the time of the accident, and whose names the conductor then took, creates no presumption that they if called would have testified against the company.

ACTION for damages by a passenger for alleged negligence in being thrown from a street car while getting off, by the starting

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up of the car after it had come to a stop to let him off. Verdict for the defendant, and motion on the minutes for a new trial.

Joseph Fitch for plaintiff.

W. E. Stewart for defendant.

GAYNOR, J.: The conductor testified that he took the names of passengers on the car at the time of the accident for witnesses; but none of them was called as a witness. Counsel for the plaintiff argued to the jury that it was the duty of the defendant to call them, and that the presumption of law was that if called their testimony would be against the defendant. The court charged the jury that the defendant was under no duty to call them; that there was no such presumption, and that the case had to be decided on the evidence produced, and without regard to the failure of the defendant to call such passengers; and this was excepted to. I am aware of no rule creating such a presumption against a party, or even permitting the testimony he presents to be looked upon less favorably, for his failure to call other persons as witnesses, except in the case of witnesses in the employ of the party, or in some other way so related to or associated with him that the law presumes that they would be favorably disposed to him if called; and in such case it must be made to appear that such persons were witnesses of the occurrence in order that the presumption may arise at all. Passengers on a car do not come in such category in respect of either party in cases like this. Prudence dictates to each party to get their names, if possible, but failure to call them as witnesses amounts to nothing. I have not overlooked the case of *Pronk* v. *Brooklyn H. R. R. Co.* (68 App. Div. 390). The reasoning there seems to be on the assumption that such presumption does arise against a party in respect of witnesses in no way connected with him; but I cannot believe that such a thing was really meant to be decided. The direct and easy answer to the proposition claimed there was, it is true, that the law allowed no such presumption. That the court instead of making such answer went on the theory that the law did allow it, and then reasoned out the case in favor of the respondent in another way which avoided the force of the point, should not suffice to establish a rule of law that such a presumption does exist.

Motion denied.

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EUGENE F. VACHERON, Plaintiff, *v.* JACOB T. HILDEBRANT, Defendant.

(Supreme Court, Queens Trial Term, October, 1902.)

Payment — When a note is a payment — When a receipt cannot be varied by parol.

Where a vendor receives, at the sale and in part payment of the price, notes of a third party, the presumption is that he accepted them in satisfaction of the debt.

Where he then executes to the vendee a receipt which recites that the said notes and a check of the vendee are in full for all claims and demands under the sale, the vendor cannot vary by his oral testimony so much of the written receipt as evidences such satisfaction.

MOTION by the defendant to dismiss the complaint on the merits made at the close of the evidence on both sides and reserved until after verdict, which was for the plaintiff; and motion on the minutes to set aside the verdict as against the weight of evidence.

The complaint was on *quantum meruit* for a balance of $900 alleged to be due on the sale of 18 street sprinklers by the plaintiff to the defendant. The plaintiff proved the value and agreed price to have been $1,800 and that $900 was paid on account.

The defendant then put in evidence the following written instrument made and delivered by the plaintiff to the defendant at the time of the sale:

"N. Y. CITY, *July* 6, 1900.

"Received from J. T. Hildebrant the sum of $900 in his check dated to-day, and three notes of M. C. Gray for $300 each payable in 3, 4 and 5 months from this date, the same being in full for all claims and demands against them under sale and transfers this day made by me.

"EUGENE F. VACHERON."

The plaintiff was then allowed under objection and exception by the defendant to give his own oral testimony tending to show as the plaintiff claims that at the time of the transaction the defendant agreed to pay the $900 if Gray did not pay the notes. The

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evidence showed that Gray had a half interest with the defendant in the purchase of the sprinklers and in a sprinkling contract transferred by the plaintiff to the defendant at the same time.

H. A. Monfort for plaintiff.

J. A. Hudson for defendant.

GAYNOR, J.: When a debtor gives to his creditor the note of a third person for an antecedent debt the law presumes that it was not received in satisfaction of the debt, and the burden is on the debtor to prove the contrary; but if such a note be so given simultaneously with the contracting of the debt the presumption is the other way, i. e., that it was received in satisfaction of the debt, and the burden is on the creditor to prove the contrary (Noel v. Murray, 13 N. Y. 167; Hall v. Stevens, 116 N. Y. 201). The plaintiff recognizing that the written receipt acknowledges that the three notes of Gray to him as payee were received in discharge of the debt of the defendant sought to prove by his oral evidence that they were not so received; and such evidence was admitted under the objection and exception of the defendant. I think this was error, as the oral evidence went to vary the written receipt in respect of whether the notes were received in satisfaction. If there had been no such writing the evidence would have been admissible. In so far as a written receipt acknowledges payment it may be varied by oral evidence showing that the payment expressed in it was not in fact made in whole or in part; but in so far as it evidences a contract or a satisfaction between the parties it cannot be varied by oral evidence, the payment it acknowledges having in fact been made (Graves v. Friend, 5 Sandf. 568; Coon v. Knap, 8 N. Y. 402; Read v. Bank of Attica, 124 N. Y. 671).

Moreover, the verdict is against the weight of evidence, if the oral evidence were considered admissible

The motion to dismiss the complaint on the merits is granted; and the verdict is set aside.

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Misc.] Surrogate's Court, Cortland County, October, 1902.

Matter of Proving the Alleged Last Will and Testament of Orlando Elster, Deceased.

(Surrogate's Court, Cortland County, October, 1902.)

Will — Undue influence.

Where a testator was old, deaf, feeble and unable to read or write and his will, made a few days before his death, was dictated to the scrivener by one beneficiary and was executed in the presence of both, one son and a wife of one year's standing, and it without apparent reason disinherited another son and a grandchild, the surrogate rejected the will, holding that whether or not the testator was upon the testimony of sound mind he had undoubtedly been subjected to undue influence in the matter.

Proceedings upon the probate of a will.

F. Hatch, for executor and proponent.

J. & T. E. Courtney, for Mortimer Elster, contestant.

C. M. Flint, special guardian and attorney in person for Blanche Elliott, an infant.

Eggleston, S. The paper offered by the proponent for probate as the last will and testament of Orlando Elster, deceased, bears date the 19th day of April, 1902, and by its provisions disposes of the real and personal property of the testator.

On the 5th day of May, 1902, Orlando Elster, the testator, died in the town of Virgil, in this county, and was of the age of seventy-six years. He left him surviving Mary E. Elster, his widow, to whom he had been married about a year; one son, Wellington Elster, who lived in the town of Cortlandville, in this county; one son, Mortimer Elster, living in the town of Virgil, and a granddaughter, Blanche Elliott, a daughter of a deceased daughter of the testator, residing in an adjoining town about three miles distant.

By the terms of the proposed will, the testator gave the use of

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all his property to his wife during the term of her life, and at her death all was to go to the son Wellington Elster, who was also made the executor of the will.

At least two wills had been made by the testator prior to the making of the paper offered for probate, one about a year previous and one about five years previous.

The paper offered for probate purports to have been signed by the testator by making his mark. The only persons present with the testator at the time of the execution of the will were the two witnesses and the two persons who are the sole beneficiaries under the will.

This paper was drawn by William A. Holton at his store in Virgil, which store was about thirty rods from the residence of the testator.

On the day of the execution of the will, the son Wellington Elster went to Mr. Holton's store and gave the direction to him for the drawing of the will. Up to this time, Mr. Holton had no word of conversation or instruction directly from the testator as to the drawing of the will, but prepared the will entirely from the dictation and direction given to him by Wellington Elster; then, taking the paper already prepared, he went to the residence of the testator and, taking him into an adjoining room, from where the two beneficiaries of the will and the other subscribing witness were, read the will over to the testator, who stated that it was as he wanted it; then, coming back into the room where the other witness and the two beneficiaries under the will were, the testator made his mark and, in response to questions asked him, acknowledged the instrument to be his will, requesting the witnesses to sign the same. The paper was signed by the testator in the presence of the two subscribing witnesses by making his mark.

That is substantially the evidence as given by the subscribing witnesses, and also is evidenced by the fact that the ink of the mark, and the signatures and places of residence of the subscribing witnesses, is of different color from that of the writing in the will. It is very evident that the writing in the will and the attestation clause was made by the scrivener prior to his going to the home of the testator. Even the words, " Orlando Elster, his mark," were evidently so written before going to the house. This would indicate very clearly that the signature by mark and the signatures of the witnesses were made at the same time at the house of Mr. Elster.

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It would also indicate very clearly that all the detail work of the drawing of the will was done at the store of Mr. Holton, and directed by the son Wellington Elster.

The execution of the will seems to have been carried out in a somewhat hurried manner. Mr. Holton states that he was in a hurry about his work, and Mrs. Curtis states that she thinks that they occupied about five minutes in the execution of the will.

There are many facts and circumstances connected with this case, as shown from the evidence, which are of a suspicious character, and call for a careful consideration upon the part of the trial court, as they are of sufficient significance to put one upon inquiry.

We have in the case a man of seventy-six years of age, somewhat feeble in health, who has made prior wills, one within a year prior to the making of the one offered for probate, who now makes a will giving his property to his wife and one son, disinheriting another son, and also disinheriting a granddaughter, who is an infant and the only child of a deceased daughter.

Again, the will is drawn under the direction, at least, of one of the main beneficiaries in the will, who gave all of the directions as to the preparation of the will, and was present with the other beneficiary in the room at the time of its execution; the apparent unequal and unjust discrimination, on the part of the testator, in the disposition of his property; the will is signed by the testator by the making of his mark; and had been fully prepared before taking it to him; the son Wellington Elster is made executor of the will. The testator could neither read nor write; his hearing was somewhat impaired. Its execution was hurriedly done — the death of the testator occurred within a few days after its execution. It is not explained why the testator himself did not go to the store of Mr. Holton, which was only a short distance from his house, as it appears he was able to walk about the house and, while it does appear that he was in feeble health, just what his condition was is not shown.

The widow was the wife of a year, and not the wife of his many years and the mother of his children.

While the evidence as to the execution of the will is not very strong or convincing, yet I am satisfied that it is sufficient to show a due execution in that respect.

One of the objections urged against the probate of the will is

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that of fraud and undue influence, and that the testator was under restraint at the time of the execution of the will.

Before this proposed will can be admitted to probate, it must be made to appear that, at the time of its execution, the testator was, in all respects, competent to make a will and not under restraint. Code Civ. Pro., § 2623. If this paper, so executed and presented in court at this time, is really an expression of the testator's mind and intention, free, voluntary, and original — and it is incumbent upon the proponents to show affirmatively that it is — then it should be admitted to probate as a valid will. If, however, it expresses merely an intention which has been created by others, by what the law recognizes as undue and improper influences — although he had testamentary intelligence — and the paper executed by him expressed his then wish and intention as to the disposition of his property, it would be void and not entitled to probate.

What is undue restraint or influence has been a subject of much discussion. No well-defined rule of law can be laid down that would be controlling in every case, for the reason that each case rests upon the facts peculiar to that class alone. A state of facts might be presented in one case which would establish undue influence or undue restraint, which, presented in another case, under different circumstances and different surroundings, explained in a different way, would not be considered of a character to void the will. It is, however, a well-established rule, as evidenced by a long line of decisions in the courts, that, when the surrogate is not satisfied that the will was properly executed, or that the testator, at the time of executing it, was in all respects competent to make a will, and not under restraint, then the court is bound to pronounce its opinion that the instrument is not entitled to probate. Delafield v. Parish, 25 N. Y. 35; Cooper v. Benedict, 3 Dem. 136; Lee v. Dill, 11 Abb. Pr. 214; Van Pelt v. Van Pelt, 30 Barb. 134; Forman v. Smith, 7 Lans. 443; Matter of Clausmann, 5 N. Y. St. Repr. 329.

Influence or restraint is undue if it is such that it has worked a wrong to some one which would not have occurred had it not been exercised. It is not indispensable that there should be direct proof of undue influence; it may be inferred from the circumstances, but the circumstances must be such as to lead justly to the inference that undue influence was employed by persons interested in the

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disposition of the property, so that the will does not express the real wishes of the testator.

The circumstances surrounding the execution of this will are indeed peculiar, and lead to but one conclusion, and that is, that the two beneficiaries named in the will were instrumental in producing a will to be made in their favor. Its execution was not attended with that care and precaution which would do away with that fact, and it seems to have been done under the observation and control of the wife and the one son. The son gives entire direction as to the drawing of the will. The will is taken to the house of the testator and, while it appears he was called into an adjoining room and it was read over to him, yet, when it comes to its execution, he is brought back into the room again, where the wife and son are, and they sit by watching its execution. This is a very significant act, and would not leave a man of advanced age, weakened in mind and body, to fully act upon his own part, and leads almost irresistibly to the conclusion that the will had been prepared by some pre-arrangement, and was closely followed up in its execution by close observation upon their part. No apparent reason is shown why the testator should have disinherited others who were natural objects of his bounty.

As has been stated, "A will should not be procured by one or two members of the family while the other members are beyond the paternal roof and entirely ignorant of what is being done in their absence." Lee v. Dill, 11 Abb. Pr. 214.

The fact that a beneficiary gives the direction or dictation for the making of a will excites the greatest suspicion against it, and an additional burden is cast upon the proponent to show by the clearest and most satisfactory proof that it is the will of the testator. Delafield v. Parish, 25 N. Y. 35.

Where a will has been prepared or procured by one interested in its provisions, an additional burden is imposed upon those who seek to establish it; the circumstances are regarded by the court with suspicion and jealousy, and there must be stronger proof than would else be required that the paper propounded expresses the free, unbiased testamentary purpose of the alleged testator, and not merely the wishes of the interested beneficiary. Estate of Peck, 10 N. Y. St. Repr. 698.

If a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the

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suspicion of the court, and calls upon it to be vigilant and jealous in examining the support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased. Newhouse v. Godwin, 17 Barb. 236.

The proposed will is an unequal will, inasmuch as it entirely ignores certain near relatives of the testator and gives all of the property to others.

It requires no stretch of imagination to find that the wife and the one son were interested in having the will made at this time. Evidently the testator was in a feeble condition, and could be expected to live but a short time, as his death followed in a few days, and the making and the execution of the will were carefully watched by them in the absence of the other son and the grandchild.

The provisions of the will are manifestly unjust and unfair in discriminating in favor of certain members of the family to the utter exclusion of the others, and this is presumption of undue influence.

Jessup, in his Surrogate's Practice, page 431, says: "Where the evidence shows that the will propounded ignores or disinherits those remembered by the testator in prior wills, or who were dependent upon the testator or whom the testator has previously regarded with affection, etc., and the will contested was made by the testator in a last illness or under circumstances of great bodily weakness, or infirmity, in favor of the person accused of exerting undue influence, the Surrogate will require explicit affirmative proof of the absence of fraud or imposition."

As to the condition of the testator's mind at the time of the execution of the will, or as to his testamentary capacity as given by the subscribing witnesses, the evidence is not very explicit, and is not entirely satisfactory. The subscribing witness, Mr. Holton, states as follows: "Q. State whether or not in your opinion he was mentally competent to make a will to will personal property and real estate. A. I had no reason to doubt his competency at all. Q. That is not quite the question. A. Why, yes, of course, I considered him competent. Q. And that is your opinion now? A. Yes."

The other subscribing witness, Mrs. Curtis, when interrogated upon that subject, states as follows: "Q. What do you say in

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your opinion, on this occasion in question, on the 19th of April last, as to whether he (the testator) was mentally competent, of sound mind, capable of making a will of personal and real property? A. I called him so. Q. Well, do you say that he was? Mr. Courtney: Now, I object to it. The Surrogate: She might have called him so and not think so; I think she may state whether she considered him so. A. Why, I called him all right for making a will. By Mr. Hatch: Q. Did you consider and believe him to be all right? Mr. Courtney: That I object to as leading, suggestive and improper. [Objection overruled.] By Mr. Hatch: Q. The trouble is in using the word 'call' for 'believe?' A. Yes. Q. Now, won't you please answer my question specifically. In your opinion, at the time he signed this paper, was he competent or incompetent; was he mentally sound or unsound? A. Sound." Considering this evidence in the light of the other evidence in the case, while it may be considered barely sufficient to show testamentary capacity upon the part of the person making the will, yet it does disclose the fact that the person was in that condition of mind that he might be easily imposed upon, or easily controlled by other persons.

Under the circumstances here disclosed, the ordinary presumptions flowing from the act of formal execution do not obtain, but the burden is thrown upon the parties seeking to establish the testamentary act to show that all those precautions were taken and those explanations were had that were necessary to secure to the party the full, free, and unbiased action of his impaired faculties.

The law looks with a very jealous eye upon any one who, standing in a friendly or confidential relation with the testator, procures, dictates, directs, superintends, or in any way influences the testator in the disposition of his property, especially if such disposition is to his personal advantage.

It is not one fact alone in this case that speaks against the proposed will, but it is a combination of facts and circumstances attending its making and execution, which, taken together, lead to the irresistible conclusion that undue influence and restraint were used in obtaining the same.

The advanced age of the testator; impaired faculties; feebleness of mind and body; inability to read and write; the signing of the will by mark; the drawing of the will solely under the direction and dictation of one of the chief beneficiaries; the witness-

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ing of the execution by all the legatees in the presence of the subscribing witnesses; the disinheriting of others who would seem to be bound to him by ties of blood and affection, and who would seem to be objects of his bounty, without apparent reason; previous wills made; short duration of time between the making of the will and the death of the testator — these are significant facts, startling in their nature, especially so when considered in connection with the weakness of the evidence of the subscribing witnesses as to competency and execution, and, when added to this the fact that one of the contesting parties is an infant, who, if the will prevails, is cut off from taking property which now rightfully belongs to her, then you have a case presented which seems to ask for the interference of the court.

While courts stand between the living and the dead, and seek in all proper cases to carry out the expressed wishes of a deceased person, yet they are not called upon to strain after probate, nor in any case to grant it where stubborn facts oppose and grave doubts exist as to the justness of so doing.

Undoubtedly the facts presented in this case have been occasioned more by the zealousness of the parties to obtain the property than by any fraudulent intent upon their part. The means employed are subject to criticism, but may be excusable in a measure by the opportunity afforded and ignorance as to the guarded way the law insists that every person shall be permitted to make a testamentary disposition of his property, uncontrolled and unbiased by influence or restraint, and the suspicion with which it looks upon any act which would give color to an attempt to divert the mind of a person weakened in body and intellect from exercising his own desire and intention.

For the reasons stated the probate of the proposed will is denied.

Probate denied.

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Matter of the Judicial Settlement of the Account of DAVID W. WEISS, as Executor, Etc., of EMILIE M. WEISS, Deceased.

(Surrogate's Court, New York County, October, 1902.)

Legacy — Ademption or satisfaction by portion or advancement.

Whenever a parent gives a legacy to a child without stating any particular object for which it is given the legacy is to be deemed a portion.

If the parent afterwards in her lifetime makes a settlement upon the child by way of a portion or pays him a sum of money by way thereof or makes an advancement to him or gives him a sum of money as an advancement, such payment, portion or advancement amounts to a satisfaction — or, as is often said, an ademption of the legacy, either *pro tanto* or in full, as the money thus paid or settled is less than, equal to, or greater than the legacy.

PROCEEDINGS upon the judicial settlement of the accounts of an executor. There being no dispute as to the facts, the matter was submitted upon the issues raised by the agreed statement of facts and the answer of the trust company as trustee herein, as a question of law to be determined by the surrogate.

Hampton D. Ewing, special guardian.

Emmet & Robinson, for trust company, as executor, etc.

THOMAS, S. By the will of the testatrix, executed in 1879, she devised and bequeathed her entire real and personal estate to the New York Life Insurance & Trust Company, as trustee, with directions to divide it into five equal parts, the income of one of which was to be applied to the use of each of her five children during his or her life, with remainder to the person or persons appointed by the last will of such child, or in case of failure to make such appointment, to the issue of such child, if any, or to the surviving children, if there were no such issue. A later clause of the will is as follows: "I authorize and direct the said New York Life Insurance and Trust Company to pay from and out of my estate to my son, on his going into business, and to my daughters, when and as they respectively marry, the sum of five thousand

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dollars. Such payments shall be charged against the shares of my children respectively to whom they shall respectively be made, and shall go in diminution of the trust estate hereinbefore devised for their benefit respectively." Subsequent to the making of the will, and in 1885, $5,000 was given by the testatrix to her son on his going into business. In or about 1889 $3,000 was given by the testatrix to her daughter Clara Emilie at or about the time she was married. The testatrix died in May, 1898, and another daughter, Grace Evelyn, was then under engagement of marriage, and had received from her about $500 with which to purchase a wedding outfit. This daughter has since received from the trustee about $4,500, making in all $5,000 as a provision on her marriage. The daughter Clara Emilie now asks that $2,000 be paid to her, and charged against the trust fund held for the benefit of herself and her children, so as to make her share amount, with the previous advancement to her, to the sum of $5,000. The trustee is accounting, and desires that its duty as to this be declared by the decree now to be made. The question thus presented cannot be determined upon the statutory provisions as to advancements, since that statute has application only to cases of intestacy. Code Civ. Pro., § 2733; Thompson v. Carmichael, 3 Sandf. Ch. 127; Hays v. Hibbard, 3 Redf. 28; Clark v. Kingsley, 37 Hun, 246. A well-settled rule as to wills will, however, require the same result in the present case. Whenever a parent gives a legacy to a child, without stating any particular object for which it is given, such legacy is regarded as a portion. And if the testator afterwards, during his own lifetime, makes a settlement upon the child by way of a portion, or pays to him a sum of money by way of a portion, or makes an advancement to him, or gives him a sum of money as an advancement, such payment, portion, or advancement amounts to a satisfaction — or, as is often said, an ademption of the legacy, either *pro tanto* or in full, as the money thus paid or settled is less than, equal to, or greater than the legacy. This rule is based upon a presumption against double portions; that is, a presumption adopted by courts of equity that a parent, owing a common duty to all his children, could not have intended to distribute his estate unequally among them and to favor one at the expense of the others. Benjamin v. Dimmick, 4 Redf. 7, 9; Langdon v. Astor's Exrs., 16 N. Y. 9, 34; Burnham v. Comfort, 37 Hun, 216, 220, affd., 108 N. Y. 535, 539; Matter of Turfler's Estate, 1 Misc.

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Rep. 58, 64; Hine v. Hine, 39 Barb. 507; Woerner's Am. Law of Admn., § 448; 1 Pom. Eq. Juris. (2d ed.) 554. It has been said that the rule has no application to legacies of remainder interests (Hays v. Hibbard, 3 Redf. 28, 30), and on this ground the special guardian for the infant remaindermen argues that it is not controlling in this case. As to whether the rule would be otherwise if the legacies by the way of advancements were of remainders, it is not necessary now to decide. In this case the advancements directed are of specific sums of money, and not of residues. They will effect a reduction in the amounts of the residues, but that is what always happens when a legacy is paid. Taking the will as a whole, it is saturated with a purpose and wish plainly in the mind of the testatrix, of treating her children with absolute equality. The payments recited, made by the testatrix in her lifetime, after the date of her will, must be considered as advancements which are to be charged against the principal of the trust shares of the children to whom they were respectively made. The daughter Clara Emilie is now entitled to receive from the principal of the fund held in trust for her the sum of $2,000, being the difference between the amount received by her in 1889 for her wedding, and the amount authorized to be paid to the daughters for such purpose by the will.

Decreed accordingly.

Matter of the Estate of THOMAS CURTIS CLARKE, Deceased.

(Surrogate's Court, New York County, October, 1902.)

Transfer tax — When a remainder is not taxable.

A remainder is not presently subject to the transfer tax where it is limited to children of the life tenant, or her appointees by will, and she is not shown to have any children, as, in such case, no transfer, defeasible or otherwise, of the remainder has yet been made.

APPEAL from the report of an appraiser.

Edward H. Fallows, for State Comptroller.

George E. Mott, for executor.

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THOMAS, S. The interests of the children of the testator, to take effect in possession at the death of his widow, all became vested at the time of his death, and are presently taxable, under rules well settled prior to the recent decision of the Court of Appeals in Matter of Estate of Cornelius Vanderbilt, 172 N. Y. 69. Matter of Vinot, 26 N. Y. St. Repr. 610; Matter of Lange's Estate, 55 N. Y. Supp. 750. The only interest which may not yet have vested, or which is subject to any contingency, is the remainder interest of the portion set apart for Mrs. Withers after her death, as to which the persons who are to become entitled are to be her issue, not shown to be in existence, or persons appointed by her in her last will. If Mrs. Withers is now without children, this remainder interest is not now taxable, since no transfer, defeasible or otherwise, has yet been made. But if any child of Mrs. Withers is now in existence, such child is now vested, under the rules laid down in the Vanderbilt case, with an estate in such remainder, subject to be divested by his death prior to his mother, and also subject to open and let in after-born children, and the tax can now be imposed. The appeal is sustained, and the matter will be remitted to the appraiser to determine the values of the remainder interests to take effect in possession on the death of the widow.

Appeal sustained and matter remitted to appraiser.

Matter of the Judicial Settlement of the Estate of JOSIAH A. WAIT, Deceased.

(Surrogate's Court, Rensselaer County, October, 1902.)

Surrogate's Court — Jurisdiction over a judgment, against a decedent, disputed by his administrator on the final accounting.

Where a widow presents as a claim against her husband's estate a decree made nearly twenty years before directing him, as executor of her father's estate, to pay her a sum of money, and the accounting administrator of her husband proposes to contest her claim upon grounds other than payment and possibly by virtue of transactions which may have occurred between the parties subsequently to the decree and which may have changed their rights in the matter, the surrogate will not dismiss the claim as it is established by a judg-

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ment, but will not act until the administrator has had sixty days in which to begin an attack upon the decree in some court of competent jurisdiction and failing an attack will determine only such issues in regard to the claim as he may under Code C. P., § 2743.

PROCEEDINGS upon the judicial settlement of the account of an administrator.

F. A. Chew and A. C. Comstock, for claimant.

Shaw, Bailey & Murphy and C. E. Patterson, for administrator.

HEATON, S. A decree of this court made November 15, 1883, in favor of Sarah M. Wait, widow of J. A. Wait, directing her husband, as executor of her father's estate, to pay over to her certain money, is presented as a claim against the estate of J. A. Wait on the final accounting. The administrator rejects the claim and refuses to refer it or consent that it may be determined by the surrogate, and files a verified answer which he claims raises issues which this court has no jurisdiction to try.

Has the surrogate jurisdiction to try the issues? The decree presented is in effect a judgment, since it is a final determination of the rights of the parties. A judgment is not such a claim as can be rejected and referred within the contemplation of sections 1822 and 2718 of the Code, any more than can a judgment against the administrator. In that sense it is final and conclusive, and it only remains for this court to determine, so far as it has jurisdiction, to whom the judgment is payable, the sum to be paid by reason thereof and all other questions concerning the same. Code Civ. Pro., § 2743; McNulty v. Hurd, 72 N. Y. 521; Matter of Browne, 35 Misc. Rep. 362, 71 N. Y. Supp. 1034.

The judgment or decree stands as a judicial settlement of the rights of the parties at its date. Transactions may have been had between the parties subsequent to the entry of the judgment or decree by reason of which the rights of the parties have been changed. How far has the Surrogate's Court power to try issues raised by such subsequent acts?

The allegations of the answer show an intention on the part of the administrator to raise other issues than that of simple payment. The general powers of a court of equity do not belong to a Surro-

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gate's Court, and that court has not such powers in equity as enable it to step aside from its duty of distributing estates of deceased persons to ascertain and hear and determine what is tantamount to an action in equity. The surrogate may inquire into and pass upon payments made to apply upon such a judgment and determine the amount due thereon. He may also determine who is the owner of the judgment and entitled to the money. Beyond this the surrogate has no jurisdiction to try and determine questions in respect to their validity. There may be grounds for relief by reason of accord and satisfaction or set-off and the like, or the estate may be entitled in equity to a release or discharge, whether in whole or in part; as to all of these there is no warrant in the statutes for the exercise of jurisdiction by the surrogate to adjudicate them. To affirm such power would open the door to a wide field of jurisdiction in law and equity by Surrogates' Courts, not contemplated by the statute, inconsistent with the limited powers conferred and in some cases subversive of the right of trial by jury. McNulty v. Hurd, 72 N. Y. 518; Matter of Corbett, 90 Hun, 182. The statement in McNulty v. Hurd that a surrogate might determine who was the owner of the judgment, undoubtedly referred to ascertaining the legal or apparent title where there was no dispute. Otherwise that conclusion would subvert the basis of the decision by opening the door to equitable jurisdiction which it sought to close. Matter of Randall, 152 N. Y. 508. So far as the allegations in the answer can be construed as setting up legal payment on the decree, the surrogate might have jurisdiction to hear and determine the same, but if they can be construed as allegations of a debt existing in favor of the administrator and against Mrs. Wait, which debt, after being established in this proceeding, it is proposed to offset against any amount due upon the decree, this court is ousted of jurisdiction. Matter of Underhill, 117 N. Y. 471.

Had the claims of the deceased been reduced to judgment a set-off could not be decreed by the surrogate. Stilwell v. Carpenter, 59 N. Y. 414.

In the Browne case, 35 Misc. Rep. 362, 71 N. Y. Supp. 1034, the facts were conceded and only a question of law was raised as to whether the judgment had been paid by reason of certain admitted facts. It is clear then that this court cannot hear and determine defenses of every name and nature which the repre-

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sentatives of the estate ought to have litigated in order to properly protect the estate. The claim, however, having been established by a court of competent jurisdiction cannot be dismissed, neither ought payment thereof to be directed before the administrator has an opportunity to seek relief from the effect of such established claim in a proper tribunal. Since there are other litigated claims in the courts against the Wait estate, there can be no decree of final settlement for some months. The administrator should resort to a court of competent jurisdiction for relief from this judgment and begin such proceeding within sixty days, and no decree directing payment of such claim will be made in the meantime. Should such administrator fail to institute such proceeding within sixty days, the amount due on such judgment may be determined within the limitations prescribed by law on any adjourned day of this accounting, upon eight days' notice by claimant to such administrator.

Decreed accordingly.

Matter of the Application for Taxation of the Estate of ANNA M. SCHMIDT, Deceased.

(Surrogate's Court, Suffolk County, October, 1902.)

Transfer tax — Comptroller's absolute right to an appraisal where the estate however small has never been taxed or exempted.

The State Comptroller is not precluded from taking in 1902 proceedings to assess the transfer tax upon the estate of a woman who died, and whose will was proved, in 1895, by the fact that the proper surrogate, upon the basis of the executor's affidavit that the estate was too small to be taxable, then orally expressed to counsel for the estate an opinion to the same effect — it appearing that no decree was then or ever entered taxing or exempting the estate and that consequently no notice of an appraisal was ever given to the persons legally entitled thereto.

MOTION to dismiss transfer tax proceedings after the usual reference for appraisal has been made.

Wingate & Cullen (T. Eliet Hodgskin, of counsel), for estate.

Joseph T. Losee, for State Comptroller.

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PETTY, S. The decedent died in 1895, and her will was proved in that year. In June, 1902, upon application of the State Comptroller, the usual order was entered referring the appraisal for purposes of taxation to the county appraiser. Thereupon this motion is brought in behalf of the estate, all action having been stayed in the meantime. At or about the time of the probate of the will, an affidavit was filed by the executor setting forth the assets and liabilities of the estate and showing the value of the net estate to be below the amount required by the statute for purposes of taxation. It is alleged and undisputed that the court at that time, at request of counsel, gave its opinion that the estate was not liable to taxation. Nothing further has been done until this proceeding. The motion is to dismiss the proceeding on the ground that the matter was determined by the court in 1895, the remedy of the State, if dissatisfied, being the right of appeal only.

The conclusion that the proceeding should be dismissed is correct, provided the premise on which it is based be correct, viz., that the matter was determined in 1895 (Matter of Crerar, 56 App. Div. 479), but with this premise I do not agree. No decree was ever entered, either taxing or exempting the estate, consequently no one had notice that the proceeding was before the court, nor was there anything from which an appeal could have been taken. If no appeal was possible the State is not barred by lapse of time. The estate has in fact rested in good faith, believing the estate to be free from appraisal or taxation, but so far as the record shows, no judicial determination has been made one way or the other. The oral opinion of the court, given informally upon a statement of fact, cannot bar the statutory proceeding when no judgment was entered and no notice thereof given to the persons entitled thereto. No official appraisal has ever been made and it is to this that the State is entitled whether the result shows a tax due or not.

The motion should be denied, without costs, the stay heretofore granted removed, and the proceeding remitted to the appraiser.

Motion denied, without costs, stay removed, and proceeding remitted to appraiser.

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THE WOODS MOTOR VEHICLE CO. OF BUFFALO, Plaintiff, *v.* JAMES B. BRADY, Defendant.

(Supreme Court, Erie Trial Term, October, 1902.)

Business corporation — When the liability of one who signs a subscription agreement becomes absolute — Offer and acceptance.

The signing of a paper stating that the signers "subscribe" for the number of shares, set opposite their names, in a corporation in process of formation under the Business Corporation Law (L. 1890, chap. 567), and that they agree to pay for their stock when called upon by the directors, followed by the filing of a proper certificate of incorporation and subsequent demands of the corporation for payment of the full subscription, make a signer liable therefor and this although the certificate does not name him as a subscriber and he never took any part in the incorporation or in the affairs of the corporation and never demanded or was tendered the stock.

ACTION to recover stock subscription.

Bissell, Carey & Cooke, for plaintiff.

Hardy & Shellabarger, for defendant.

KENEFICK, J. The defendant and several other persons signed the following agreement, to-wit: "We, the undersigned, in consideration of the mutual covenants and agreements hereinafter contained, hereby subscribe for the number of shares set opposite our respective names, of the seven per cent. preferred, noncumulative capital stock of a corporation to be organized under the laws of the State of New York, for the purpose of dealing in automobiles and motor vehicles, which corporation is to have a capital stock of three hundred thousand dollars ($300,000), of which one hundred thousand dollars ($100,000) shall be seven per cent. (7 per cent.) preferred, noncumulative stock, and two hundred thousand dollars ($200,000) common stock, and we further agree to pay for the said stock so subscribed whenever payment of the same may be called for by the Board of Directors of said corporation. Dated this 16th day of January, 1900."

The aggregate number of shares subscribed was 235, of which the defendant subscribed fifty.

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Subsequently, and on the 2d day of June, 1900, this certificate of incorporation, signed and acknowledged by all the persons who executed the agreement except the defendant, and by two other persons, was duly filed: "We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and at least a majority of us residents of the State of New York, desiring to form a corporation pursuant to the provisions of the Business Corporation Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose, as follows:

"*First.* The name of the proposed corporation is 'Woods Motor Vehicle Company of Buffalo, N. Y.'

"*Second.* The purposes for which it is to be formed are: The manufacturing, leasing, purchasing, and selling of all kinds of automobiles, motor vehicles, and other vehicles, and all the parts thereof, and other vehicles used or designed to be used in connection therewith; the operating, leasing, and renting for hire of all kinds of automobiles, motor vehicles, and other vehicles, including the carrying on of a general business in automobiles, motor vehicles and other vehicles, and everything connected therewith and incidental thereto.

"*Third.* The amount of capital stock is three hundred thousand dollars ($300,000), of which one hundred thousand dollars ($100,000) is to be preferred, seven per cent. (7 per cent.) noncumulative stock, and of which two hundred thousand dollars ($200,000) thereof is to be common stock. Upon the dissolution of the said corporation the said preferred stock is to be paid in full before any dividend is paid to the holders of the common stock.

"*Fourth.* The number of shares of which the capital stock shall consist is one thousand (1,000) shares of preferred seven per cent. noncumulative stock of the par value of one hundred dollars ($100.00) each, and two thousand (2,000) shares of the common stock of the par value of one hundred dollars ($100.00) each, and the amount of capital with which the said corporation will begin business is five thousand dollars ($5,000.00).

"*Fifth.* Its principal office is to be located in the City of Buffalo, County of Erie, and State of New York.

"*Sixth.* Its duration is to be fifty (50) years.

"*Seventh.* The number of directors is to be eleven.

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"*Eighth.* The name and post-office address of the directors for the first year are as follows:

Names.	P. O. addresses.
"John J. McWilliams	Buffalo, N. Y.
"Robert K. Root	Buffalo, N. Y.
"William R. Huntley	Buffalo, N. Y.
"Frank S. McGraw	Buffalo, N. Y.
"H. H. Hewitt	Buffalo, N. Y.
"Frederic Nicholls	Toronto, Ont.
"DeLancy Rankine	Niagara Falls.
"W. Seward Webb	New York, N. Y.
"Charles R. Huntley	Buffalo, N. Y.
"J. Wesley Allison	New York, N. Y.
"Walter P. Cooke	Buffalo, N. Y.

"*Ninth.* The post-office addresses of the subscribers, and a statement of the number of shares which each agrees to take in the corporation, are as follows:

Names.	P. O. addresses.	Number of shares.
"John J. McWilliams	Buffalo, N. Y.	5
"Robert K. Root	Buffalo, N. Y.	5
"William R. Huntley	Buffalo, N. Y.	5
"Frank S. McGraw	Buffalo, N. Y.	5
"H. H. Hewitt	Buffalo, N. Y.	5
"Frederic Nicholls	Toronto, Ont.	5
"DeLancy Rankine	Niagara Falls, N. Y.	5
"W. Seward Webb	New York, N. Y.	5
"Charles R. Huntley	Buffalo, N. Y.	5
"J. Wesley Allison	New York, N. Y.	5
"Walter P. Cooke	Buffalo, N. Y.	5

"*In Witness Whereof,* we have made, signed, acknowledged and filed this certificate in duplicate.

"Dated this 16th day of January, 1900."

All the incorporators and two other persons are named in the certificate as subscribers to the capital stock.

The defendant is not named therein as a subscriber, and, so far as the evidence discloses, he took no part in the incorporation of the plaintiff, nor has he participated in any way in the affairs of

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the plaintiff since its organization. He has never demanded certificates of stock, nor has he ever been tendered any.

On June 13, 1900, the board of directors of the plaintiff called for the payment of subscriptions, to be paid as follows: Twenty-five per cent. at once, twenty-five per cent. in thirty days, and fifty per cent. in sixty days, from date. Notice of such call and for the payment of the first assessment was sent to and received by the defendant July fourteenth, for the payment of the second assessment July twenty-sixth, and for the final payment September fourth. The defendant did not comply with any of these demands and he has paid nothing on his subscription.

The plaintiff bases its right to recover solely upon the agreement hereinbefore set out, the subsequent incorporation of the plaintiff pursuant to such agreement, followed by the plaintiff's demand for payment of the subscription.

The distinction between an agreement to form a corporation and subscribe to its stock, and an agreement to subscribe for shares when the corporation is organized, which excellent authority says is "unsound in principle and disappears as mere *dicta* upon a thorough sifting of the cases" (Cook Stock & Stockh. [3d ed.], § 75, citing Prof. Collin), has been clearly adjudicated in this State in the recent case of Yonkers Gazette Co. v. Taylor, 30 App. Div. 334, and the agreement in the case at bar falls within the former class. Of such an agreement Justice Hatch says, in the Taylor case (p. 337): "This is absolute and unconditional; it does not contemplate further action upon the part of those signing and must be regarded as final, when, being unrevoked, it is acted upon by the corporation then in contemplation of formation." The defendant was held liable in that case under the same statute, although the only evidence that the corporation had acted upon the agreement was (1) the incorporation of the company, (2) the naming of the defendant as a subscriber in the certificate, and (3) the tendering to him of the stock and demanding payment of the subscription.

The single, essential feature which distinguishes the present case from the Taylor case is the omission here to name the defendant as a subscriber in the certificate.

Is such omission conclusive evidence of an election on the part of the corporation to reject the defendant as a subscriber, or is it simply a circumstance to be considered in connection with other

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evidence in determining whether his subscription was accepted? I take the latter view. Under the very first call for the payment of subscriptions, made twelve days after the organization, the plaintiff makes a demand upon the defendant for the payment of his subscription. Any inference of rejection based on the omission of his name from the certificate is overborne by this recognition of his subscription.

If, as the Taylor case holds, it is not necessary to the binding force of a preliminary subscription for the signer of the agreement to participate in the execution of the certificate, I can see no reason for holding that the insertion of his name therein as a subscriber is the only evidence of the acceptance by the corporation of his subscription.

Were this an original question, I should be inclined to hold that only those are stockholders who subscribe the certificate, or who, after the organization, subscribe for stock on the books of the company. This would furnish a safe and simple rule, and I think was the mode of subscription contemplated by the statute under which this plaintiff was organized.

The former act for the incorporation of business corporations (Laws of 1875, chap. 611; 3 R. S. [8th ed.], 1978) ordained the following method for organizing a corporation thereunder. The incorporators were required to sign a certificate and file the same with the Secretary of State. This certificate was not required to state the names of the subscribers, or of the directors. The Secretary of State thereupon issued to the incorporators a license empowering them as commissioners to open subscription books, and when one-half of the stock was subscribed a meeting of subscribers was called, and at such meeting by-laws were adopted and directors elected. The incorporators then filed with the Secretary of State a copy of the proceedings at such meeting, a copy of the subscription list, a copy of the by-laws, and a list of the directors elected, and thereupon the Secretary issued a certificate that the corporation was fully organized. Thus the incorporators and the signers of the preliminary subscription constituted the shareholders at the time of the organization.

The present statute (Laws of 1890, chap. 567) makes no provision for a preliminary subscription, and the corporation is fully organized when the certificate is duly filed and recorded and the tax paid. Gen. Corp. Law, Laws of 1890, chap. 563, § 5. Now

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the certificate is required to state (1) the number of directors, (2) the names of the directors for the first year, (3) the names of the subscribers, and (4) the amount of capital with which the corporation shall begin business. Laws of 1890, chap. 567, §§ 2, 3. Under the former statute the first three of these items were determined by the preliminary subscribers at the meeting held after the filing of the certificate. Under the ruling in the Taylor case a signer of the subscription agreement may be entirely excluded by the incorporators from any voice in the selection of directors for the first year and in the determination of the amount of capital with which the company shall begin business, and is completely bound by the action of the incorporators in these respects if they only name him as a subscriber in the certificate. Indeed, as but three incorporators are necessary under the act, it is possible for a minority of the preliminary subscribers to execute the certificate of incorporation and bind the majority in the matters above mentioned by a simple recognition of their subscription in the certificate.

This alone would be sufficient warrant for holding that the only subscription before organization which the present statute contemplates is that made by the signing of the certificate of incorporation.

The reasoning in the cases of Troy & Boston R. R. Co. v. Tibbits, 18 Barb. 297; Erie & N. Y. City R. R. Co. v. Owen, 32 id. 616, and Poughkeepsie, etc., Plank Road Co. v. Griffin, 21 N. Y. 150, seems to me to sustain this view, although the statute under consideration in each of these cases differed in some respects from that considered here.

The case of Buffalo & J. R. R. Co. v. Gifford, 87 N. Y. 294, is not in conflict, because there the defendant had ratified his preliminary subscription by paying calls made thereon after the organization of the company, and thus the subscription could well be deemed to have been made at the time of such payment.

It would not, however, be profitable to pursue the discussion further, inasmuch as I feel bound under the Taylor case, *supra*, to hold the defendant liable.

Other interesting questions are raised by the defendant but none of them present any substantial objection to the plaintiff's claim.

Judgment is directed for the plaintiff, with costs.

Judgment for plaintiff, with costs.

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ANNIE COLEMAN, by her Guardian GEORGE COLEMAN, Plaintiff, *v.* THE ROBERT GRAVES Co., Defendant.

GEORGE COLEMAN, Plaintiff, *v.* THE ROBERT GRAVES Co., Defendant.

(Supreme Court, Kings Trial Term, October, 1902.)

Negligence — A child's dress set on fire while she was poking with a stick in hot ashes properly left in its vacant lot by a company — Active vigilance not required of it.

A child nine years old whose dress was set on fire while she was poking with a stick in some hot ashes of chips and shavings, seeking for pieces of brass, cannot recover damages, for injuries thereby sustained, of a company whose employee lighted the fire in its vacant lot in the proper conduct of its business and this because the company owed her no duty requiring it to exercise active vigilance to prevent such an accident.

MOTION for a new trial upon the minutes.

Achille J. Oishei and John Mitchell (Nelson L. Keach, of counsel), for plaintiff.

Pearsall, Kapper & Pearsall, for defendant.

NASH, J. The case here cannot be distinguished in principle from Walsh v. Fitchburg R. R. Co., 145 N. Y. 301.

There a turntable was located upon the premises of the defendant in an open space in the city of Troy where pedestrians were in the habit, without any special consent or objection of the defendant, of passing over this space near the turntable in going from one point or street in the city to another. It was also in proof that children were in the habit of playing upon the turntable, some riding upon it while others revolved or turned it by getting into the pit in which it was located and pushing it around. The plaintiff, a child of five years of age, was injured while playing and riding upon the turntable with other children. It was held by the Supreme Court that if a defendant erects and maintains upon his own land for his own use a structure capable of inflicting injury

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to persons, and by its appearance and operation calculated to attract or allure children *non sui juris,* and to endanger their life or limbs, and leaves the same unguarded, and injury results therefrom to such children without fault or negligence of their parents or guardians, it is negligence on the part of the defendant for which a recovery may be had. 78 Hun, 1.

In reversing the judgment of the court below, Judge Peckham, delivering the opinion of the court, said that the defendant had not been shown guilty of a violation of its duty, nor had a question been made for the jury in that respect by proof that it used the turntable in the manner it did. That some means might have been adopted which possibly might have prevented the happening of the accident, that the table might have been kept so fastened or locked when not in use that people could not turn it without unfastening or unlocking it; continuing, the learned judge said: "But was defendant bound to do so? Did it owe any such duty to the public or to this plaintiff? The turntable was on its own land; it was used by the defendant for the sole purpose of properly conducting its own business; it was a fit and proper machine for that purpose; it was not of the nature of a trap for the unwary; it was not built in any improper or negligent way with reference to the transaction of the business of the defendant. What further duty did it owe to those who had no business upon its land, who came there unasked and whose presence was simply tolerated?

"Upon the question of alluring plaintiff, we do not think it can be correctly said defendant either enticed or allured him to come upon its land.

"The whole case in this respect rests upon the doctrine that the turntable was, as to children of tender years, a dangerous and at the same time an enticing machine, one which, when seen, would inevitably and infallibly allure children to come upon it for the purpose of playing upon it, and that the natural and probable result of such play would be the injury of the child. Under such circumstances it is claimed that a person owning such a machine, although it be used on his own land, is bound to exercise extra vigilance for the purpose of preventing injury to children who come upon the defendant's land allured by the machine and ignorant of its dangers. We do not think the facts of this case bring it within any such principle."

And that was the decision of the court.

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The case here differs from that in no material aspect. The burning of the chips or shavings thrown out from the defendant's factory, it must be assumed, was done for the purpose of properly conducting its business. While it might be apprehended that children playing upon the vacant lot of the defendant would play around the fire and even play with the fire, and, as urged on behalf of the plaintiff, be enticed to search in the hot ashes for the pieces of brass, the setting fire to a pile of shavings on the lot was not in the nature of a trap for the unwary; a child of nine years knows that fire will burn; the little girl, as she says, was aware of this; there was fire in the ashes and she used a stick. She did not think her dress would take fire, neither would the defendant's employee who threw out the chips and set fire to them. The accident which overtook this child is extraordinary, one which, in the exercise of reasonable forethought, would not have been apprehended. But it is not necessary to place the decision upon that ground. The defendant here, under the circumstances, within the principle held in Walsh v. Fitchburg R. R. Co., owed no duty to the plaintiff requiring active vigilance to prevent the occurrence of such an accident.

Motion denied.

CHARLES DE KAY TOWNSEND, et al., Plaintiffs, *v.* THE GREENWICH INSURANCE COMPANY and LOUISE C. BLYTHE, Defendants.

(Supreme Court, Nassau Trial Term, October, 1902.)

Fire insurance — Written agreement of all parties to appraise a loss not assailable by the owners in a common law action on the policies — Oral evidence to vary a written instrument — Fraud or mistake must be pleaded — Rescission and restoration.

1 **A written agreement to appraise a loss on mortgaged premises, payable to the mortgagee, executed by the owners, the mortgagee and the insurers, and followed by an award thereunder and payment thereof, cannot be varied by oral evidence that to induce the insured to enter into the same the agent of the insurers orally promised or agreed that, notwithstanding its terms, the arbitrators should not follow the same but should award at least $6,000, and only consider whether they should award more.**

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Where a written agreement is complete in itself proof of an oral agreement made at the same time is inadmissible to vary it.

Fraud cannot be predicated on a mere promissory statement inducing the making of an agreement where its terms are understood.

A common law action to recover on a policy of insurance cannot be maintained where an award has been made and paid unless the plaintiffs first rescind and restore; and although the award was paid to the mortgagee the insured owners must still restore it where it was paid for their benefit and under the terms of the policies.

ACTION on a policy of insurance on a building by the owners.

The complaint is in the usual form on the policy, alleging a total loss, compliance with all the terms of the policy &c., and prays for judgment for $2,500, the amount of the policy. It also alleges that the policy was by its terms payable to the defendant Blythe, who holds a mortgage for $20,000 on the premises, and that she is made a defendant because she refused to join with the plaintiffs in bringing the action.

The answer pleads as a defence that after the loss the plaintiffs and the said mortgagee and the defendant company entered into an appraisal agreement in writing to fix the amount of the loss, as provided for by the terms of the policy, and that the appraisers fixed the amount, viz., $4,156.58, by their award in writing, and it was paid to and received by the said mortgagee.

There were two other similar actions tried at the same time, viz., one against Continental Insurance Company and one against Hanover Fire Insurance Company (the said Blythe being also made a defendant in each in the same way), on similar policies for $2,000 and $2,500 respectively on the same building, and payable to the said mortgagee Blythe.

The same testimony applied to all of the cases, and the three companies were parties to the said appraisal.

William D. Gaillard and Mortimer S. Brown for plaintiffs.

Michael H. Cardozo for defendants

GAYNOR, J.: When the defendants had put in evidence the written appraisal agreement and the award thereunder, and proved payment of such award, viz., $4,156.58, to the mortgagee, i. e.,

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the defendant Blythe, as required by the policies, the plaintiffs gave evidence that prior to and at the time of the execution of such appraisal agreement the agent of the defendant companies stated to them and orally agreed in substance that notwithstanding the said written appraisal agreement was in general terms for the ascertaining of the amount of the loss, $6,000 would be allowed without dispute, and the appraisal would be confined to determining whether more than $6,000 should be the amount of the loss, the plaintiffs claiming $7,000, which was the total insurance by the three companies; and that they were induced thereby to execute such written agreement. Strangely enough, neither side to the arbitration communicated such oral arrangement to the appraisers, but left them to act under the terms of the written agreement, which required them to ascertain and appraise the actual loss as they should find it, and they found it to be less than $6,000, viz., $4,156.58. The jury found by special verdict that such oral agreement was made, and the cash value of the building at the time of the destruction to have been $9,000. All questions of law were reserved, and both sides move for judgment, the defendants having also moved for a direction of a verdict in their favor at the close of the evidence, which was reserved until after verdict.

1. The oral evidence, received under objection and exception by the defendants, varied the written appraisal agreement, which was that the appraisers should appraise and ascertain the actual loss. Such agreement was complete on its face and covered the whole subject. If the understanding was that the award had to be at least $6,000 it needed to be in the written agreement. It was in no sense collateral; it was essentially of the subject matter of the appraisal. The oral evidence was therefore incompetent and must be disregarded (Wilson v. Deen, 74 N. Y. 531).

2. The oral evidence was not sufficient to show fraud or mutual mistake by the defendant companies. There was no mistake at all about the written agreement; the plaintiffs concededly knew its contents thoroughly. Fraud cannot be predicated upon the promissory statement of the agent of the companies that the appraisal would be confined to whether the loss was more than $6,000 (*Ex parte* Fisher, 18 Wend. 608).

3. There was no issue of fraud or mistake on the pleadings. The complaint did not seek to have the arbitration agreement annulled; it was simply a complaint in a common law action to re-

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cover the amount of the policy. A defendant cannot be made to meet an issue of fraud or mistake in the making of a contract unless it be tendered to him by the complaint. In *Sullivan* v. *Traders' Insurance Co.* (169 N. Y. 213), a reply alleging fraud by appraisers in the making of an award, which was pleaded as a defence, was allowed to eke out the complaint which contained no such allegation but was like the present one. There is no reply here; and besides that case is generally understood to be a border one, and not to serve as a precedent except in an exactly similar case.

4. Finally, in order to maintain this action, which is one at law, the plaintiffs had first to rescind and restore the amount they had received; and to maintain a suit in equity to set aside the written appraisal agreement and the award thereunder they would have to offer in their complaint to restore the amount received, and also tender it to the defendant companies in court at the opening of the trial. That the amount of the award was not paid directly to the plaintiffs, but to their mortgagee in reduction of the mortgage, does not make a difference. It was paid for their account and benefit. They cannot retain it and take the chance of getting more. They must first restore it, and take the chance of getting less (Gould v. Cayuga Co. Natl. Bank, 86 N. Y. 75; 99 N. Y. 333; Remington Paper Co. v. London Assurance Corporation, 12 App. Div. 218).

Judgment for the defendants.

ELIZA DAVIS, Plaintiff, *v.* GABRIEL DAVIS, et al., Defendants.

(Supreme Court, Nassau Special Term, October, 1902.)

Fee — When not cut down by subsequent words.

Where a will contains, primarily, a clear devise in fee it will not be cut down by subsequent words of ambiguous or doubtful meaning.

A testator, after dividing the remainder of his estate into six equal shares and disposing of five of them, used the following language:

"The other of such equal shares or portions, I give, devise and bequeath to my daughter Eliza Davis, free from all claims of any creditor or creditors, and should in the opinion of my executor, the said income be at any time in danger of being levied upon, or be

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levied upon by a judgment creditor, or other creditor, by any proceeding whatever, then I direct that said income shall cease as to my said daughter, and the same be divided into as many equal parts as there are children born of her body, then in being, and each of such children shall then receive one of such equal shares or portions".

Held, that the daughter took a fee under the words "I give, devise and bequeath", and that the words subsequent thereto must be deemed inconsistent or nugatory.

SUIT for the construction of a will in respect of a devise of real property.

Gerlach & Schwegler for plaintiff.

G. L. F. Rohan for defendants.

GAYNOR, J.: The testator bequeathed and devised the bulk of his estate, real and personal, to his executors in trust to collect the income and pay the same to the widow for life. By a subsequent clause he divided the said trust property into six undivided equal shares upon the death of the widow, and then by separate clauses bequeathed and devised one of such shares to each of his five grandchildren and to his daughter; the formal words of bequest and devise to the daughter being the same as in the case of each grandchild, but followed by additional words, all being as follows:

"The other of such equal shares or portions, I give, devise and bequeath to my daughter Eliza Davis, free from all claims of any creditor or creditors, and should in the opinion of my executor, the said income be at any time in danger of being levied upon, or be levied upon by a judgment creditor, or other creditor, by any proceeding whatever, then I direct that said income shall cease as to my said daughter and the same be divided into as many equal parts as there are children born of her body, then in being, and each of such children shall then receive one of such equal shares or portions."

The question is whether the daughter by this clause takes an absolute fee. I think she does. The rule of construction of wills to which all other rules must bend is that the expressed intention of the testator as manifested by the entire contents of the will must prevail. Artificial rules of construction may not be resorted to

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at all unless such intention be uncertain, such rules being allowed only to enable the intention to be spelled out by their aid when it is uncertain upon a reading of the whole will (Smith v. Bell, 6 Peters, 68; Matter of James, 146 N. Y. 78; Jurgens v. Rogge, 16 Misc. Rep. 100). The words following the words of absolute devise to the wife in the present case, are inconsistent with such devise, and bungling and obscure of meaning. An absolute devise of land "free from all claims of any creditor or creditors" of the devisee is impossible. When the absolute title vests it must necessarily be subject to the claims of such creditors; the testator cannot by merely saying that it shall not be make it so. It may be that the testator could have devised upon a limitation or condition subsequent that upon the devisee becoming insolvent she should be divested of title (Jarm. ch. 27, sec. 6), but he did not do so. The remaining provision, that "should in the opinion of my executor the said income" be in danger of being levied on at any time, "then I direct that said income shall cease as to my said daughter," and be divided into as many equal parts as she has living children, "and each of such children shall then receive one of such equal shares or portions", is ineffective and meaningless. It presupposes that the income and not the *corpus* had been given to the daughter, which was not the case, the word "income" not theretofore having been used at all; or else its purpose is to take away the income from the daughter if she should become insolvent, and leave her only a barren fee. But while it may be perceivable that the testator had such an intention, there are no words which express it and on which it can be carried out. It may be perceived that the testator's intention was to create a trust, but he used no words which accomplish such a result.

But if the clause in question expresses anything, it is at best of such doubtful meaning that it has to be construed by the aid of the artificial rule that where there is primarily a clear devise in fee, such estate will not be lessened by subsequent words of ambiguous or doubtful meaning (Benson v. Corbin, 145 N. Y. 351).

The next clause of the will fully reveals that the testator was seeking to prevent his daughter's creditors, present or future, from collecting their claims out of any of his estate which should "vest" in her either by the terms of the will, or by "force of any law or statute", for he there so provides in so many words, and that is the entire contents of such clause, which was evidently inserted

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for greater certainty. But such a provision in a will is wholly nugatory.

Let judgment be entered that the daughter took an absolute fee under the will.

JOHN W. WHITELEY, Plaintiff, *v.* SETH SPRAGUE TERRY, Defendant.

(Supreme Court, New York Trial Term, October, 1902.)

Contract — Illegality of object — A real estate broker who offers to sell without written authority from the owner (L. 1901, chap. 128) cannot recover of him commisions.

A real estate broker of a city of the first or second class who offers for sale real property without written authority from the owner, etc., is guilty of a misdemeanor under L. 1901, chap. 128, and therefore the broker can recover no commissions of the owner on a sale made, as the transaction is made illegal by the statute.

ACTION to recover a broker's commissions upon a sale of real estate. Motion to set aside a verdict and for a new trial.

Charles W. Coleman, for plaintiff.

McKelvey & Mattocks (John L. Hill, of counsel), for defendant.

CLARKE, J. Action to recover a broker's commission upon a sale of real estate. At the close of plaintiff's case a motion was made to dismiss the complaint upon the ground that by chapter 128 of the Laws of 1901, section 640d, had been added to the Penal Code, as follows: "In cities of the first and second class, any person who shall offer for sale any real property without the written authority of the owner of such property, or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property with the owner thereof, shall be guilty of a misdemeanor." That the proof established that if any authority had been given to the broker it had not been in writing and that, therefore, his action in offering

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the property for sale was illegal, to wit, a crime, and that an action would not lie to recover compensation for doing an act which the statute declares to be a misdemeanor. As the action was being tried as a short cause, the statute recent, and the point novel, time was not afforded for its proper consideration. The motion was, therefore, denied; the court stated, however, that the point would be reserved and examined upon the motion for a new trial. The case thereupon proceeded and upon sharply conflicting testimony the jury returned a verdict for the plaintiff for the full amount of the commission claimed. This is a motion to set aside that verdict and for a new trial. In Johnston v. Dahlgren, 31 App. Div. 204, the plaintiffs were master plumbers and had completed their contract. Although they had a certificate of competency to do work as plumbers under the provisions of chapter 602 of the Laws of 1892 they had never registered their name and address at the office of the board of health, or received a certificate of said registration as required by that statute. The court said: "In express terms, the statute provides that it shall not be lawful for any person to engage in or carry on the trade, business or calling of an employing or master plumber, in any of the cities of this State, unless his name and address should have been registered as above prescribed. * * * It hardly needs the citation of authorities to establish the proposition that, as the contract to do plumbing under these circumstances is unlawful, the courts will not give any aid in enforcing it and will not permit a person to recover anything because he has performed it." The Court of Appeals in this same case (166 N. Y. 357) said: "There can be no doubt that the effect of the violation of the statute was to preclude them from enforcing a recovery upon their contracts." In Fox v. Dixon, 34 N. Y. St. Repr. 710, which was an action to recover for medical services, it was not disputed that the physician had not filed the certificate required by chapter 513 of the Laws of 1880, which forbade any person to practice medicine without registry, and declared the person who did so guilty of a misdemeanor. The court said: "It is a settled principle that one cannot recover compensation for doing an act to do which is forbidden by law and is a misdemeanor. The contrary rule would make an absurdity. It would permit one to hire another to commit a misdemeanor, and would compel the payment of the contract price for doing what the law forbids. Whether this statute is wise or

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not we cannot examine. * * * We must give effect to it. And we cannot permit a recovery of compensation for doing an act which this statute declares to be a misdemeanor." The above case is cited with approval and followed, and the same point decided, in Accetta v. Zupa, 54 App. Div. 33, and Ottaway v. Lowden, 55 id. 410, and there are many other cases to the same effect. In each of those cases there was no dispute as to the making of the contract and the performance of the work, labor, or service. In the case at bar the defendant denied both the making of the contract and the performance of the services. While it may be said that the verdict of the jury resolved both of those propositions in favor of the plaintiff, yet it is undoubtedly true that the very reason for the enactment of this recent statute was the fact that these disputes between owners and brokers had been most frequent. It may be considered, perhaps, as a new statute of frauds. If there had been a written authorization, this particular dispute would not have arisen. As plaintiff is suing upon a state of facts condemned by the statute as illegal, upon a transaction declared to be a misdemeanor, the motion should have been granted and the complaint dismissed. I must, therefore, grant the motion to set aside the verdict and for a new trial, but, as the ground therefor is one of law, without costs.

Motion granted, without costs.

ISABELLA ARNOT, Plaintiff, *v.* JAMES M. HILLS, Impleaded, Etc., Defendant.

(Supreme Court, New York Special Term, October, 1902.)

Action to compel a conveyance for conspiracy and fraud — Voluntary trust when valid — Evidence not to be pleaded — Parties — Demurrer to complaint.

A complaint which states that the plaintiff had an inchoate right of dower in a house then about to be sold in foreclosure, that the defendant Roberts bought it on the sale upon the trust to carry the house for the plaintiff until she could reimburse him, that the rents he collected therefrom and her payments to him exceeded his payments on and for the house, that he refused to reconvey to her upon the terms he had agreed upon, that upon her suing him for

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specific performance of the said trust or agreement he caused a mortgage upon the house to be foreclosed and conspired with the defendant Hills to buy it in in Hills' name but really for Roberts. states a cause of action against both defendants to compel them to convey to the plaintiff, and this although the complaint does not state that the trust agreement had a valuable consideration — a voluntary trust being enforcible when fully constituted — and although it is not alleged that the trust was evidenced as required by statute — it being unnecessary to plead evidence.

DEMURRER to complaint.

Joseph McElroy, for plaintiff.

Henry Hartman, for defendant Hills.

SCOTT, J. The defendant Hills demurs to the complaint as not stating facts sufficient to constitute a cause of action. The purpose of the action is to compel a conveyance of certain real estate alleged to have been acquired by the defendant Roberts as trustee for plaintiff, and subsequently, by conspiracy between Roberts and Hills, transferred through a sale in foreclosure to Hills in name, but really to him, as the representative and agent of Roberts. Taking the facts stated in the complaint as admitted, Hills is a necessary party to the action, if the action can properly be maintained at all. For, if the plaintiff has a cause of action which would entitle her to a judgment for a conveyance of the property to herself from Roberts, she is certainly entitled to join as defendant Hills, in whom the paper title is found to be, but who, as she says, took title merely as a cover for Roberts, the trustee, and with knowledge of the relations between Roberts and the plaintiff. The defendant, however, in support of his demurrer, argues that no cause of action is set forth in the complaint against Roberts. The allegations of the complaint, briefly stated, are, that plaintiff's husband owned certain houses, including the one in suit, in which plaintiff had an inchoate right of dower, and which were heavily incumbered, and were about to be sold under foreclosure. That the premises were purchased by defendant Roberts pursuant to an agreement whereby he promised to purchase the property in suit for the plaintiff, and carry it in trust for her until he

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should have been reimbursed the amount expended by him, when he would execute a deed of the property, subject to two mortgages, aggregating $25,000. That, while he held the property, he should collect the rents and apply the same to the payment of interest, taxes, etc. That plaintiff paid him some moneys on account of his disbursements, and that he has collected sufficient rents to repay himself in full, and to pay all taxes, etc., but has refused to convey to the plaintiff as he agreed to do. That plaintiff commenced an action against him to compel him to perform his alleged agreement, whereupon he caused a mortgage upon the property to be foreclosed, and conspired with Hills to buy in the property in his own name, but in fact for Roberts himself. The demurring defendant attacks this alleged trust agreement as being without consideration. It is true that the complaint does not show that there was any consideration, but this fact is not necessarily fatal to the plaintiff's claim, for even a voluntary trust without consideration may be enforced if it was in fact fully and completely constituted. (Van Cott v. Prentice, 104 N. Y. 45.) Whether this alleged trust was fully and completely constituted can only be determined when the plaintiff's proofs have been produced. She alleges an agreement which the parties were competent to make. Whether or not it was evidenced as required by statute is not stated in the complaint, and was not necessary to state, because all that the plaintiff was required to do was to state the ultimate fact that a trust was created. It was not necessary to plead the evidence of that fact. It may be that the plaintiff will find difficulty in establishing the trust which she alleges, but, accepting her allegations as true, she does state a cause of action against Roberts. Consequently, as already shown, Hills is properly made a defendant.

The demurrer is overruled, with costs, with leave to the defendant to withdraw the demurrer and answer the complaint within twenty days upon payment of costs.

Demurrer overruled, with costs, with leave to defendant to withdraw demurrer and answer within twenty days upon payment of costs.

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CAROLINE ZANDER, Plaintiff, v. THE NEW YORK SECURITY & TRUST CO., Defendant.

(Supreme Court, New York Special Term, October, 1902.)

Action to compel issue of a new certificate of deposit for one lost — Non-negotiable instrument — Security not requirable of plaintiff under Code C. P., § 1917 — Payment to depositor protected by Code C. P., § 1909.

Code C. P., § 1917 does not apply to an action brought against a security and trust company by a person who held, but has lost or inadvertently destroyed, a certificate or receipt by which the company promised to pay her "or her assigns" a named sum of money, and who seeks by her action to compel issue to her of a new certificate.

Such a certificate is not a negotiable instrument within L. 1897, chap. 612, § 20.

Code C. P., § 1909 would protect the company in paying her the money even if she had assigned the certificate, assuming the company to have had no notice of the assignment.

DEMURRER to complaint.

Wilson, Barker & Wilson, for plaintiff.

Hornblower, Byrne, Miller & Potter, for defendant.

SCOTT, J. It is alleged by the complaint, and admitted by the demurrer, that, on or about July 11, 1901, the plaintiff deposited with defendant the sum of $500, and received therefor the following certificate or receipt:

"The New York Security and Trust Company, New York, July 11, 1901, has received from Caroline Zander the sum of five hundred dollars of current funds, upon which the said company agrees to allow interest at the annual rate of three per cent. from this date, and on five days' notice will repay, in current funds, the like amount with interest, to the said Caroline Zander or her assigns, on return of this certificate, which is assignable only on the books of the Company." Then followed provisions as to the reduction or discontinuance of interest not material here.

Plaintiff always remained the owner of the certificate, has never

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assigned it or any part thereof, or in any way indorsed or transferred it or any interest therein. Before August 9, 1901, she lost or inadvertently destroyed the certificate, and, though she has diligently searched, she has been unable to find it, and, on August 9, 1901, she notified defendant of the loss of the certificate. She has duly demanded of defendant the issue of a new certificate, or the payment of the amount of the deposit. The demurrer is stated to be interposed merely for the purpose of enabling the defendant to insist that the plaintiff shall be required to give the security specified in section 1917, Code of Civil Procedure. That section refers to lost negotiable paper, and the question which presents itself is, therefore, whether or not the certificate of deposit given by defendant is negotiable. Section 20 of chapter 612, Laws of 1897, known as the Negotiable Instruments Law, declares that an instrument, to be negotiable, "must be payable to order or to bearer," and, in this respect, is merely declaratory of the law of negotiable paper as it existed before the passage of the statute. The papers which were before the court in the cases principally relied upon by defendant conformed to the foregoing definition, and in each case the decision turned upon the fact that the lost receipts were payable to "order," which circumstance was held to render them negotiable instruments, and to require that indemnity be given before judgment upon them could be rendered. Frank v. Wessels, 64 N. Y. 155; Read v. Marine Bank, 136 id. 454. The receipt or certificate in the present case is not negotiable. The money represented by it is payable not "to order or bearer," but to the plaintiff "or her assigns." It is, therefore, what is known to the law as a nonnegotiable instrument. In an action upon a lost or destroyed instrument of this description, it is not necessary that the plaintiff should give or tender indemnity. Wright v. Wright, 54 N. Y. 437; Mills v. Albany Exchange Savings Bank, 28 Misc. Rep. 251. The distinction between actions on negotiable and nonnegotiable instruments, and the reason for the different rules respecting the necessity for indemnity in such actions are too obvious, and too clearly stated in the authorities cited, to require restatement here. The demurrer admits that the plaintiff never parted with or assigned the certificate, and that it has been lost or destroyed. Even if the plaintiff had not lost or destroyed the certificate, and has assigned it, the defendant would assume no risk in paying her the amount represented thereby. Sec-

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tion 1909 of the Code of Civil Procedure provides that, except in the case of a negotiable instrument, the transfer of a claim or demand passes an instrument which the transferee may enforce by an action or special proceeding, or interpose as a defense or counterclaim, in his own name, as the transferor might have done, "subject to any defense or counterclaim, existing against the transferor, before notice of the transfer." Payment to the plaintiff would be a complete defense to any claim or action by her upon the certificate of deposit, and equally be a defense of any action or claim by a transferee from her, if made before notice of the transfer, and it does not appear and is not suggested that defendant has received any notice of a transfer by her.

The demurrer must be overruled, with costs and an extra allowance of twenty-five dollars, with leave to the defendant to withdraw the demurrer and answer within twenty days upon payment of costs.

Demurrer overruled, with costs and extra allowance, with leave to withdraw demurrer and answer within twenty days upon payment of costs.

THE GERMAN SAVINGS BANK OF THE CITY OF NEW YORK, Plaintiff, *v.* JOHN J. BRODSKY et al., Impleaded, Etc., Defendants.

(Supreme Court, New York Special Term, October, 1902.)

Consideration — Forbearance to sue — Collateral liability for any deficiency on foreclosure.

A bank, holding upon premises a mortgage, one of whose mortgagors has suddenly become bankrupt, which informs the present owner of the fee that it will under its rules at once take action in the matter unless it is given additional security for the loan, in the form of his collateral bond, and which, after receiving the same from him, forbears for three years from foreclosing the mortgage, creates for the collateral bond a valuable consideration moving to the owner of the fee, and is entitled to have the decree in foreclosure provide that he be liable for any deficiency.

Forbearance to sue upon an overdue claim is a sufficient consideration for the promise of a third person to pay the debt — even though no definite time of forbearance be fixed — provided there is forbearance for a reasonable time.

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ACTION to foreclose a mortgage.

A. Henry Mosle, for plaintiff.

G. A. Seixas, for defendants.

SCOTT, J. This is an action to foreclose a mortgage given by Philip and John Goeritz and their respective wives to the plaintiff. The only question to be determined is whether or not the plaintiff is entitled to a deficiency judgment against the defendant Brodsky. It appears that, at some time between the making of the mortgage and May 13, 1899, the defendant Brodsky became the owner of the mortgaged property. On April 15, 1899, the plaintiff, by its secretary, wrote to Brodsky as follows: "In accordance with the rules of this institution under which loans on bond and mortgage are continued, you are required to give your collateral bond for the mortgage covering premises 72 Chrystie street * * * Mr. Philip Goerlitz going through bankruptcy proceedings, this request is made by advice of counsel." It does not appear what the rules of the bank were respecting the continuation of loans on bond and mortgage, nor is it shown that any such rules were ever brought to Brodsky's notice otherwise than by the reference thereto in this letter. On May ninth the secretary of plaintiff wrote again to Brodsky, referring to the previous letter of April fifteenth, and remarking, upon Brodsky's failure to comply with its demands, and then writing as follows: "We beg to give notice that unless your bond will be in our possession on or before the expiration of the present week, and voucher for the payment of taxes on the premises for the year 1898 submitted, the matter will be referred to our Board for such action as may be deemed expedient." A few days later Brodsky executed and delivered to the bank the collateral bond upon which it is now sought to hold him personally liable for the debt. This bond is under seal, but no consideration is expressed. It recites that the maker is the present owner of the premises covered by the mortgage and that, upon the application of the plaintiff, he has agreed to execute his bond as further and collateral security, and he undertakes to pay the amount due upon the mortgage upon demand. The defense to the prayer for a personal judgment against himself is

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that the bond was without consideration. Forbearance to sue upon an overdue claim is sufficient consideration to support a collateral obligation by one other than the original debtor to pay the debt, and this even if no definite time is set for the forbearance if, in fact, the creditor does forbear for a reasonable time. Elting v. Vanderlyn, 4 Johns. 237; Mutual Life Ins. Co. v. Smith, 23 Hun, 535. In the case at bar there is no direct evidence that the bank promised to continue the loan, but it is quite evident that it was hesitating between such a continuation and immediate foreclosure. The first letter written by plaintiff's secretary indicates this very clearly. Reference was made in it to the "rules of this institution under which loans on bond and mortgage are continued," and the reason given for requiring a collateral bond is that one of the original mortgagors and bondsmen is going through bankruptcy. In the second letter there is a distinct threat that some action will be initiated by the officers of the bank if the collateral bond be not given. After these very plain intimations that the loan could be permitted to remain undisturbed only if a collateral bond was executed, the bond was signed and the plaintiff did in fact forbear to foreclose the mortgage for some three years. Under these circumstances, it seems impossible to doubt that the consideration which Brodsky sought and obtained for the execution of the bond was the bank's forbearance to sue, a consideration which may be readily believed to have been of consequence to him as the owner of the property affected by the mortgage. It would be highly inequitable if, after enjoying the consideration, he could escape his obligation. My conclusion is that the decree should contain a provision for a personal judgment against the defendant Brodsky for any deficiency that may arise upon the sale.

The usual decision and decree may be presented for signature.

Judgment accordingly.

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HENRY R. KUNHARDT, as Substituted Trustee under the Last Will and Testament of WHEATON BRADISH, Deceased, Plaintiff, *v.* HARRIET BRADISH et al., Defendants.

(Supreme Court, New York Special Term, October, 1902.)

Vesting — When immediate under a direction "to pay" in the future.

The rule, that where the only gift of a fund is found in a testamentary direction to executors to "assign and pay" at a future time vesting is postponed until payment, will not defeat a vesting at the death of the testator where the postponement of payment is for the convenience of the estate only.

ACTION for the construction of a will.

Redfield, Redfield & Lydon, for plaintiff.

Lockwood & Hill, for defendants.

SCOTT, J. This action is brought for the purpose of obtaining a judicial construction of the sixth clause of the will of Wheaton Bradish, deceased, who died in 1862, leaving a widow, Emily Bradish, and three daughters, Harriet Bradish, Eliza Smith and Catherine Trenor Kunhardt, his only heirs-at-law and next of kin. The widow died some years later, leaving a son by a prior marriage, to whom she bequeathed all her property. This son died intestate, leaving a widow, Almina A. Proctor, and a daughter, Emily Boylan, both defendants herein. Of the children of Wheaton Bradish, Harriet is still living and is an insane person. The second daughter, Eliza Smith, died soon after her father, and before his widow, leaving a husband and a son, both defendants herein. The third daughter, Catherine Trenor Kunhardt, died in 1901, and her executors are defendants herein. The sixth clause of the will, of which a construction is sought, after reciting that the testator will be entitled to the sum of £13,000 sterling on the death of a brother, bequeathes to his executors out of such fund the sum of £4,500 in trust, to invest the same, "and during the life of my daughter Harriet Bradish apply the income (and in their discretion any portion or portions of the principal thereof)

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to her use so far as may be necessary or desirable for her greatest comfort, and secondly to the use of my said two daughters Eliza and Catherine Trenor, in equal shares; and upon the decease of my said daughter Harriet to assign and pay the remaining principal and unexpended income of the said fund to my said two daughters Eliza and Catherine Trenor in equal shares, and the residue of said annuities (meaning the £13,000) over and above all said sum of £4,500 I give and bequeath to my said two daughters Eliza and Catherine Trenor, in equal shares to their own use respectively." The question suggested by this clause is whether the testator's two daughters, Eliza and Catherine Trenor, severally acquired on his death a vested interest in and to an equal moiety of the principal sum of £4,500 and the surplus income derived therefrom, and hence whether, in view of Harriet's survivorship of her two sisters, the said fund and surplus income and accumulations of interest pass to the representatives of said sisters, or whether, as to the remainder of said fund, after the death of Harriet, the testator died intestate. In the one case the representative of the deceased daughters will take the whole fund and all the surplus and accumulated income; in the other case, one-third of the fund will pass to the widow and daughter of the son of testator's widow by a former marriage. The doubt in the case arises from the existence of the general rule that, where the only gift of a fund is contained in a direction to executors to pay and divide at a future time, the vesting is postponed until the time shall arrive when the payment and division is to be made. The rule is, of course, well recognized, but it is not inflexible, and, as was said by Judge Andrews, in Campbell v. Stokes, 142 N. Y. 29: "It is a rule for ascertaining the real intention of a testator and not for defeating it." Reading the sixth clause of the testator's will, in the light of other provisions in the same document, it seems to be clear that it was his intention that his two daughters, Eliza and Catherine Kunhardt, should ultimately receive the whole of the fund of £13,000, the vesting of £4,500 being merely suspended or postponed during Harriet's lifetime. In this respect the will under consideration much resembles that which was before the Court of Appeals in Matter of Young, 145 N. Y. 535. It was said in Matter of Embree, 9 App. Div. 602–605, that, "even though there be no other gift in the will than that contained in a direction to pay or distribute in

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the future, yet if such payment or distribution appear to be postponed for the convenience of the estate only (as to let in some intermediate estate), the ulterior legatees will take a vested interest at the death of the testator." This is precisely the condition created by the clause of the will of Wheaton Bradish, concerning which a construction is asked. My conclusion is that the testator's daughters, Eliza and Catherine Kunhardt, severally took, at the testator's death, vested interests in the fund of £4,500 set aside to provide for Harriet during her lifetime, and consequently that their representatives will, upon the death of Harriet, be entitled to said fund and the accumulations of income, and are, during Harriet's lifetime, entitled to receive the surplus income.

Judgment accordingly.

HERMAN FROMME, as Surviving Partner of the Firm of FROMME BROTHERS, Plaintiff, *v.* THE UNION SURETY & GUARANTY CO., and PATRICK J. MCDONALD, Defendants.

(Supreme Court, New York Special Term, October, 1902.)

Attorney's lien, Code C. P., § 66 — Defendant's attorney can have none unless he interposes a counterclaim — Effect on a complaint of a demurrer to the answer — Lien not enforcible in equity.

An attorney, for a defendant who succeeded in an action in which a temporary injunction had been granted against him, cannot acquire under Code C. P., § 66 any lien in the action where the answer he served therein contained no counterclaim, and hence where he thereafter seeks to assert in equity such a lien against his client and against a surety, for the adversary, which became liable in damages to the client when the injunction was vacated, the attorney's demurrer to their answer must result in the dismissal of his complaint, and this under the rule that such a demurrer searches the whole record for the first fault in pleading defective in substance.

An equitable action will not lie to enforce a lien under said section.

ACTION to enforce an attorney's lien.

James A. Douglas, for plaintiff.

Van Schaick & Norton (Clarence E. Thornall, of counsel), for defendants.

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SCOTT, J. This is an action to enforce an attorney's lien. The defendant has answered and the plaintiff demurs to two of the defenses pleaded. The defendant not only undertakes to sustain its answer, but, as it has a right to do, attacks the complaint as not stating facts sufficient to constitute a cause of action. It is well settled that a demurrer to an answer searches the whole record for the first fault in pleading that is defective in substance. Baxter v. McDonnell, 154 N. Y. 432. The plaintiff alleges that he is the survivor of a firm of lawyers who were attorneys for the defendant McDonald in an action brought against the latter by Henry Youngs and others. In that action a preliminary injunction was obtained restraining McDonald from removing or interfering with certain personal property in a house in the city of New York; this preliminary injunction was continued, the plaintiffs Youngs and others giving an undertaking, upon which the defendant surety company was the surety, to pay any damages that McDonald might sustain by reason of the injunction, if it should finally appear that it was improvidently granted. Upon the trial of the action of Youngs against McDonald, the latter was successful, and the complaint was dismissed, the injunction falling with it. Thereupon the damages suffered by McDonald, by reason of the injunction, were assessed at $2,075, which amount, on appeal, was reduced to $775. McDonald's taxable costs in the action amounted to $389.94. The plaintiff claims a lien upon the damages thus assessed for his services rendered to McDonald in the action brought by Youngs and others, and sues to establish and enforce such lien. If it shall appear, as the defendant insists, that the plaintiff herein cannot successfully assert a lien upon the damages awarded to his former client, this action must fail, and it will be unnecessary to consider any other question raised upon the argument of the demurrer. What is commonly known as a charging lien, such as the plaintiff seeks to enforce here, so far as it exists in this State, rests upon the provisions of section 66 of the Code of Civil Procedure, which provides that "From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosesoever hands they may come." It is well settled that the

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attorney for a defendant can acquire no lien under this section unless his answer has contained a counterclaim. National Exhibition Co. v. Crane, 167 N. Y. 505–508. Such, indeed, is the plain provision of the section, and when an attorney has acquired a lien by the service of an answer containing a counterclaim, it is upon that counterclaim that he is given a lien, and the verdict, report, decision, judgment, or final order to which the lien attaches is that which is founded upon the counterclaim contained in the answer. It is not alleged in the complaint that McDonald's answer in the action against him by Youngs contained a counterclaim, and certainly the liability of the defendant surety company to McDonald, upon which the plaintiff now seeks to impress a lien, was not founded upon any counterclaim contained in McDonald's answer in the injunction suit. The plaintiff, therefore, has no lien upon the indebtedness of the defendant surety company to McDonald, and this action cannot be maintained to enforce such a lien. Even if the plaintiff had such a lien as he seeks to enforce, it seems to be well settled that an equitable action like the present could not be maintained. Fischer-Hansen v. Brooklyn Heights R. R. Co., 63 App. Div. 356; Goodrich v. McDonald, 112 N. Y. 157. The complaint as against the defendant surety company must be dismissed, with costs.

Complaint as against defendant surety company dismissed, with costs.

PATRICK J. SHEA, Plaintiff, *v.* THE FIDELITY & CASUALTY CO., Defendant.

(Supreme Court, New York Special Term, October, 1902.)

Liquor Tax Law — Cancellation of bond when enforcible.

The liability of a surety upon a bond given under the Liquor Tax Law continues until the Statute of Limitations has barred any action upon the bond, and until then the principal cannot procure a cancellation thereof and a return of his deposit therefor where the surety resists it.

DEMURRER to complaint.

Voepel & Wahle, for plaintiff.

Nadal, Smyth & Carrere, for defendant.

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SCOTT, J. The plaintiff, being about to engage in the business of trafficking in liquor, procured the defendant to give the bond required by the Liquor Tax Law. An agreement was thereupon made between plaintiff and defendant whereunder plaintiff deposited with defendant the sum of $1,600 (the amount of the bond), which he agreed should be held by defendant as indemnity during the term of said bond or any renewals, extensions, or changes thereof, "and until all liability thereunder has ceased." It was further agreed that, if the defendant should sustain no loss, damage, costs, charges, and expenses, it will, upon demand, "and upon complete and satisfactory evidence of the cancellation and discharge of the company's liability as such surety," return the money so deposited. The term for which the bond was issued has expired, and it has not been renewed or extended. The company has suffered no loss under it, and the complaint alleges that there are not at present, undetermined in any court of record, or not of record or before any referee, any civil or criminal action or proceedings arising out of, or affecting, or in any way relating to, the business carried on by plaintiff in connection with which the bond was given. The question, therefore, is whether the defendant's liability on the bond has ceased, and whether the facts stated in the complaint can be said to be satisfactory evidence of the cancellation and discharge of the defendant's liability as surety. The purpose of the deposit of the money was, as the agreement clearly shows, the complete indemnification of the defendant. The Liquor Tax Law makes no provision for a cancellation of such a bond as defendant gave, and the defendant can be wholly indemnified only when a reasonable possibility no longer exists that it can be called upon to pay upon the bond. The liability of a surety upon a bond given under the Liquor Tax Law does not terminate at the end of the year for which the bond is given, but extends beyond that term so far as concerns offenses committed during the year for which the bond is given, or, in case of surrender, during the time that the certificate is held. Lyman v. Cheever, 168 N. Y. 43. The defendant's liability, therefore, will continue until the Statute of Limitations stands in the way of any action upon the bond. The plaintiff seeks to establish the proposition that the defendant no longer rests under any liability by alleging that, during the time for which the bond was issued, he "did not suffer or permit any gambling to be done in the place designated in the tax certificate,

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or in any yard, booth, garden or other place appurtenant thereto or connected therewith, or suffer or permit such premises to become disorderly, and did not violate any of the provisions of the Liquor Tax Law, and that no fines and penalties accrued against him during the time the certificate was held, and that no judgment or judgments for any fines and penalties were recovered, nor any costs taxed or allowed," and that he has in all respects complied with the laws of the State of New York governing the traffic in liquors. He insists that the demurrer admits all these facts to be true as alleged, and, therefore, that it stands admitted that no cause of action exists under which the defendant can possibly suffer liability upon its bond. Even if these facts are true, as alleged, can it be said to be certain that the defendant will ever be called upon to pay anything upon the bond? If an action were brought, the question whether or not any penalty had been incurred would resolve itself into a question of fact which would have to be determined by fallible men, who might find the fact against the plaintiff, notwithstanding the verity of his denials. But, apart from this consideration, the indemnity covers not only fines or penalties that may be imposed, but also all costs, charges, and expenses incurred by the defendant by reason of having become a surety upon the bond. If an action should be brought, even though upon a trial it should be decided that the plaintiff had done or suffered to be done nothing for which a fine or penalty could be imposed, still the defendant would unquestionably be put to costs, charges, and expenses in defending the action to a successful issue. My conclusion is that the facts stated in the complaint do not show that the defendant's indemnification is, as yet, complete.

The demurrer must, therefore, be sustained, with costs.

Demurrer sustained, with costs.

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THE PEOPLE ex rel. NICHOLAS KRONCKE, Relator, *v.* WILLIAM J. O'BRIEN, Sheriff, Warden of the County Jail of the County of New York, Respondent.

(Supreme Court, New York Special Term, October, 1902.)

Contempt, civil — Failure of a son to support his mother as directed.

Disobedience of an order, of the Court of General Sessions of the Peace in and for the city and county of New York, made under Code Crim. Pro., § 915, and directing a son to support his mother, is a civil, and is not a criminal contempt and therefore he may be punished for it by an imprisonment exceeding thirty days.

HABEAS CORPUS proceedings. The facts are stated in the opinion.

W. H. Mellor, for relator.

George L. Rives, Corporation Counsel, for respondent.

STECKLER, J. Under sec. 915 of the Code of Criminal Procedure the relator, in a proceeding instituted in the Court of General Sessions by the commissioner of charities on the complaint of relator's mother, was fined $35 for contempt in failing to comply with the order of the court directing him to support his mother, and committed to the common jail, there to remain until payment of the fine or until sooner discharged. The relator was incarcerated September 8 last, and his discharge is now sought by habeas corpus on the theory that the contempt of which he was guilty is a criminal contempt, and that as the maximum period of imprisonment for such a contempt, being thirty days in this case, has expired, he is entitled to his liberty.

The relator's counsel seems to contend that because a court of criminal jurisdiction adjudged the prisoner's offense a contempt, such contempt must necessarily be a criminal one. In this I think he is in error. Respecting disobedience to the orders of a court of record, the sole difference between a criminal and a civil contempt appears to be that a willful disobedience is a criminal contempt, while a mere disobedience by which the right of a party

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is defeated or hindered is a civil contempt (People ex rel. Negus v. Dwyer, 90 N. Y. 407). The order authorizing the prisoner's commitment does not show his willful disobedience to the court's mandate. On the contrary, the order recites a mere violation of the mandate, and that his disobedience actually did defeat, impair, impede and prejudice the rights and remedies of the commissioner of charities. If the relator is right in his contention, then a criminal court of record could never punish for any contempts except criminal contempts.

Although the proceeding in which the mandate was issued was a special proceeding of a criminal nature (Code Crim. Pro., part VI, title VIII), the proceeding to punish for contempt was not necessarily a criminal proceeding. (See Code Civ. Pro., chap. 17; title 3; People ex rel. Negus v. Dwyer, *supra*); and as the relator was fined merely the amount due for his mother's support, and the maximum period of imprisonment for civil contempts has not expired (Code, sec. 2285), the writ must be dismissed and the prisoner remanded.

Writ dismissed and prisoner remanded.

PATRICK EAGAN, Plaintiff, *v.* THE NEW YORK TRANSPORTATION Co. et al., Defendants.

(Supreme Court, Queens Special Term, October, 1902.)

Tort — Joinder of causes of action.

Although an injury to the person and one to personal property, both caused by the same tortious act, constitute two causes of action, both may be united in one complaint under Code C. P., § 484, subd. 9.

TRIAL of an issue of law raised by a demurrer to the complaint on the ground that two causes of action are improperly united.

The first cause of action is for damage for injuries to the person and the second for damage for injuries to personal property, both caused at the same time by the same tortious act of the defendants, viz., negligently running a vehicle into the plaintiff's vehicle in

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the street and injuring the plaintiff in his body and also injuring his vehicle.

Lyman A. Spalding for plaintiff.

Alexander, Watriss & Polk for defendants.

GAYNOR, J.: It is now set at rest in this state by the decision in *Reilly* v. *Sicilian Asphalt Paving Company* (170 N. Y. 40) that injury to the person and injury to personal property by the same tortious act constitute two causes of action. But may they not be united in the same complaint? By subdivision 2 of section 484 of the Code of Civil Procedure causes of action for personal injuries may be united, and by subdivision 6 causes of action for injuries to personal property may be united. This would prevent the different causes mentioned in these two subdivisions from being united. But subdivision 9 provides that causes of action "upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section", may be united. The word "claims" as here used is shown by the context not to be restricted to contract claims, but extends to torts. In the present action both causes are upon claims arising out of the same transaction. The words, "and not included within one of the foregoing subdivisions", are not restrictive, and do not stand in the way. They are obscure in meaning at first. The true meaning is that causes arising out of the same transaction may be united, though not both or all included within any previous subdivision and therein allowed to be united. Where they are included within any of such subdivisions, they do not need the help of subdivision 9 in order to be united.

Nor does the concluding provision of the section, that "it must appear upon the face of the complaint that all of the causes of action so united belong to one of the foregoing subdivisions of this section", stand in the way, for the two causes united in this complaint belong to one of such subdivisions, viz., to subdivision 9.

The demurrer is overruled.

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THE PEOPLE ex rel. CHARLES H. CLARK, Relator, v. THE WARDEN OF SING SING PRISON, Respondent.

(Supreme Court, Westchester Chambers, October, 1902.)

Crimes — Indeterminate sentences of felons — Pardoning power — Statute not ordinarily to be declared unconstitutional at Special Term.

The first clause of the Penal Code § 687a, enacted by L. 1901, chap. 425, and providing indeterminate sentences for felons, is constitutional.

A sentence thereunder is not void for the uncertainty of the duration of the term as the sentence is to be deemed a definite one for the maximum duration of the term.

The statutory provisions which permit a prisoner to be pardoned by a "board of commissioners of parole prisoners" (L. 1889, chap. 382, as amd.) are constitutional.

The court at Special Term should not declare a statute unconstitutional unless it clearly is so.

THE relator, Charles H. Clark, on March 27, 1902, in the Court of General Sessions, New York county, before Foster, J., pleaded guilty of the crime of assault in the second degree. He was thereupon sentenced to an indeterminate sentence of "not less than one year, nor more than five years," in the State Prison at Sing Sing. This sentence was imposed in conformity with the first sentence of section 687a of the Penal Code, which was enacted by Laws of 1901, chapter 425, which took effect September 1, 1901.

The second sentence of section 687a was enacted by Laws of 1902, chapter 282, and did not take effect until about three weeks after the sentence of this relator. The Penal Code (§ 687a) does not provide the means whereby a convict, imprisoned under an indeterminate sentence, may secure parole or discharge.

Statutory provisions for the indeterminate sentence of persons to houses of refuge, and to the Elmira Reformatory and other reformatory institutions, had been in existence for many years.

In 1889 the various provisions of the Revised Statutes (Pt. V, chap. 3, tit. 2), together with the many acts amendatory thereof,

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were codified and re-enacted as the "State Prison Law" (Laws of 1889, chap. 382). By section 74 of the State Prison Law of 1889, it was provided that whenever any male person over sixteen years of age was convicted of a felony punishable by imprisonment in a State prison for a term to be fixed within certain limits, the court "instead of pronouncing upon such offender a definite sentence of imprisonment * * * *may* pronounce * * * an indeterminate sentence * * * with minimum and maximum limits only specified."

Sections 75, 76, 77, 78, 79, 80, 81, 82, and 83 thereupon created a board of commissioners "of paroled prisoners;" gave this board jurisdiction to entertain applications for parole or discharge; authorized them to admit prisoners to parole, or to grant them absolute discharge; and vested in them power to retake prisoners who had violated the terms of their parole.

Thereafter sections 74, 75, and 76 of the State Prison Law were amended by Laws of 1901, chapter 260. By this act of 1901, the possibility of obtaining a parole or absolute discharge was extended to certain therein described felons, who had been sentenced for *definite terms*. The new statute arbitrarily created minimum and maximum limits, and provided that they might apply for parole or discharge after the expiration of the newly created minimum term.

In 1901 a new section (687a) was added to the Penal Code by Laws of 1901, chapter 425, taking effect September 1, 1901. This new section made it *incumbent* upon the trial judge to impose an indeterminate sentence upon a defendant "never before convicted of a crime punishable by imprisonment in the State prison, who is convicted in any court in this State of a felony, the maximum penalty for which, exclusive of fines, is imprisonment for five years or less."

The relator, Clark, was sentenced under the provision last quoted. He sued out a habeas corpus, and sought his discharge from imprisonment upon the ground that the provision for indeterminate sentence was unconstitutional.

The Warden of Sing Sing Prison, as a return to the writ, returned a certified copy of the judgment of conviction.

Charles A. Watson, for relator.

Robert C. Taylor, Assistant District Attorney, opposed.

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KEOGH, J. The defendant was convicted of assault in the second degree, and sentenced to imprisonment in the State prison for the term of not less than one nor more than five years. This sentence was imposed in compliance with the amendment of the Penal Code which directs that "a person never before convicted of a crime punishable by imprisonment in the State prison, who is convicted of a felony, the maximum penalty for which, exclusive of fines, is imprisonment for five years or less, and sentenced to a State prison, shall be sentenced thereto under an indeterminate sentence, the minimum of which shall not be less than one year, or in case a minimum is fixed by law, not less than such minimum, and the maximum of which shall not be more than the longest period fixed by law for the punishment of the crime of which the offender is convicted."

The defendant seeks a release on the ground that this law providing for an indeterminate sentence is unconstitutional.

The objections to the law may be classified as follows:

First. That the release is a judicial power and that a statute which permits a release or parole to be granted by administrative officers is unconstitutional.

Second. That the power to release conferred on the prison officials infringes the Governor's constitutional pardoning power.

Third. That the sentence is void for uncertainty.

The Constitution has committed to the Legislature the power to define crime, and within definite limits to regulate its punishment. The Legislature has frequently enacted that certain crimes must be punished by the offender's imprisonment for a definite and arbitrary term of years, irrespective of any palliating circumstances and leaving no discretion to the court. It has also and in many cases provided that the commission of certain other crimes may be punished by the offender's imprisonment for not less than a certain term of years, nor more than another definite term of years, and in this way the criminal law has been enacted and administered in this State for many years. The Legislature has always treated as within its exclusive province the power to define crime and to prescribe its punishment.

The law which we are considering, instead of giving the court discretion to terminate the prisoner's imprisonment before the expiration of the maximum period prescribed by law, confers upon the prison officials constituting a prison board the power to do so,

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when in their judgment the prisoner's good conduct and reformation merits such a reward.

The Legislature has in this way exercised its exclusive control over the punishment of crime by conferring upon prison officials powers which it heretofore conferred upon or withheld from the courts at pleasure.

The objection that the statute interferes with the Governor's pardoning power is answered by the provisions of the law itself (§ 83), which declares that "Nothing herein contained shall be construed to impair the power of the Governor of the State to grant a pardon or commutation of sentence." As long as the offender remains in prison the Governor's power to pardon him is absolute. If he is released by the operation of this law it is a favor of which the offender cannot complain.

In addition to all this, for many years, under the laws of this State creating and regulating the State reformatories, indeterminate commitments of women and children have been made, many having been committed during minority and others for a definite term, subject to be reduced by good behavior and reformation.

The right of the Legislature to enact such laws and of the prison officials to apply them as occasion arose has in effect been established by the acquiescence of the bar and community for a long period of time.

It is difficult to find a good reason for asserting that the exercise of a legislative power which has been accepted as constitutional when applied to minors should be treated as a violation of the Constitution when applied to adults. A statute similar to ours has been in force in many of the sister states and its constitutionality upheld by the courts. It is useless to string out here extracts from opinions given in such cases, the volumes which contain them are open and easy of access to the profession; it is sufficient to refer to them in a foot-note to this statement.

The objection that the law makes the duration of the sentence uncertain is untenable because the sentence imposed under the statute must be regarded as a definite sentence for its maximum term. There is little doubt but that the present system is better than the one which it supplanted; the prison officials whose duty it is to observe the daily life, study the character traits and investigate the life record of the prisoner can far more correctly and

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intelligently decide, when a prisoner may be released with advantage to the community, than can the judge, who knows nothing of the accused, except what is revealed by the testimony on his trial. The study made by intelligent men into the working of laws similar to the one under consideration has shown that very many adult convicts, especially first offenders, who have been released under its provisions, have permanently reformed and have become useful members of society.

Before the court at Special Term should declare this law invalid its unconstitutionality should appear beyond question.

The application for the prisoner's discharge is denied. State ex rel. Atty.-Gen. v. Peters, 43 Ohio St. 629, 81 Ohio L. 72–76, § 5, quoted at p. 644; People ex rel. Bradley v. State Reformatory, 148 Ill. 413; George v. People, 167 id. 447; Miller v. State, 149 Ind. 607; Commonwealth v. Brown, 167 Mass. 144; Murphy v. Commonwealth, 172 id. 264; Oliver v. Oliver, 169 id. 592.

Application denied.

Matter of the Final Accounting of JAMES S. EADIE, as Executor of the Last Will and Testament of JOHN EADIE, Deceased.

(Surrogate's Court, Kings County, October, 1902.)

Judicial settlement of account — Nature of an executor's claim against his testator as mortgagor — Not subject to collateral attack — Costs when denied contestant.

Mortgages given an executor by a testator on property of which he died seized are not claims which the executor must establish upon the judicial settlement of his account by proof, nor are such mortgages assailable therein by objectors to the account upon the ground of fraud — or otherwise than by a direct equitable action between the parties.

Where the account as settled shows that the estate owes the executor more than he has been surcharged as a result of a contest, the contestants should not have costs as they have not rendered the estate any material benefit.

PROCEEDINGS upon the final accounting of an executor. Motion to confirm referee's report.

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Shipman, Larocque & Choate (Frederic A. Ward and Henry B. Pogson, of counsel), for executor.

Andrew J. Provost, for contestants.

William H. Ford, special guardian for Ford S. Cole and for William M. Cole, Sr., William M. Cole, Jr., and Secor A. Cole.

CHURCH, S. This is a motion to confirm a referee's report.

Except the legal proposition, which I will consider hereafter, the various questions which were argued before the referee turn principally upon the construction that he should give upon the evidence that was advanced.

I have examined the evidence, the referee's report, and the briefs of counsel with considerable care. The referee had the benefit of the parties appearing before him, and could observe their demeanor and method of testifying. From this he has drawn certain conclusions, and there is nothing shown upon the papers which would indicate that he has made any error, except that the counsel for the contestants assumes that the evidence is entitled to a different interpretation.

Upon these questions, therefore, it is unnecessary for me to say anything further, except that the referee, by his opinion, appears to give the same very careful attention and consideration and to have thoroughly appreciated the importance of the various questions which were submitted to him, and not only is there nothing to show that he has committed an error in his interpretation of the same, but a careful inspection of the testimony seems to uphold his views.

There is one question of law, however, which is argued before me with considerable force. It appears that the testator, in his lifetime, executed to the executor two certain mortgages upon property of which he died seized and possessed. The counsel for the contestants endeavors to assail the validity of these mortgages, and contends that they are in the nature of a claim which is presented by the executor against the deceased's estate, and that the executor must, therefore, prove his claim. In this, it seems to me, the contestants are clearly mistaken. Claims against a deceased's estate, as understood by the law, means obligations owing by the

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deceased which have not been reduced to judgment, or which are not specific liens upon any portion of his estate and which require to be proved in order to be allowed.

A bond and mortgage is an instrument under seal; the bond imports consideration and is the evidence of the debt, and the mortgage is a direct lien upon the real estate of the deceased. They were, therefore, good as to all the world, until they were set aside by a decision of a court of equity in an appropriate proceeding brought for that purpose, and the executor was not required to prove the same in the ordinary method, as required of claims against a deceased's estate. Nor did the referee, nor does this court, have jurisdiction to attack these mortgages collaterally and permit the contestants to produce evidence tending to set aside such instruments on the ground of fraud. If the parties desire to set aside any apparent conveyance then they could go into a court of equity and take action to cancel or set aside these instruments. Matter of Randall, 152 N. Y. 508; Matter of Bolton, 159 id. 129.

There remains but the question of costs, which are asked for by the counsel for the contestants.

As the final account shows that the estate is in debt to the executor more than the amount which the referee has held that he should surcharge himself with, it cannot be said that the contestants, in making this contest, have rendered any material benefit to this estate, and, therefore, his request in this respect is denied.

As to the special guardian, however, he is entitled to his allowance for the services rendered herein. Let him present an affidavit showing the character of the services rendered herein.

The motion to confirm the referee's report is granted; decree to be settled on notice.

Motion granted.

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Matter of the Judicial Settlement of the Accounts of EDWARD MITCHELL and GROSVENOR S. HOADLEY, as Executors and Trustees under the Last Will and Testament of BENJAMIN D. SILLIMAN, Deceased.

(Surrogate's Court, Kings County, October, 1902.)

Judicial settlement — Executors' expenditures for their account not limited by Code C. P., §§ 2561, 2562.

The amount which executors may lawfully expend and be allowed for the services of counsel, upon the judicial settlement of their account, in preparing the same and for procuring it to be passed and settled is not limited by Code C. P., §§ 2561, 2562.

PROCEEDINGS upon the judicial settlement of the accounts of executors.

William Mitchell (S. Sidney Smith, of counsel), for executors.

Luke D. Stapleton, for contestants.

CHURCH, S. Upon the presentation by the executors of their account for a judicial settlement, it appears that they have paid their counsel for his services, rendered to them in all the proceedings, the sum of $5,653.04. To this item objection is filed by one of the next of kin of the deceased, on the ground that it was excessive.

Upon cross-examination of the counsel who had rendered such services, he specified the same in detail and what he considered a proper charge for the same. It appears that he has included a fee which is intended to be in full for his services upon this accounting; he also stated that it was not the intention of the executors, if this bill was allowed, to ask the surrogate to make any allowance under sections 2561 and 2562 of the Code.

The estate was a large one, involving between a million and a quarter and a million and a half dollars, and consisted of both real and personal property in about equal proportions.

The various figures which counsel has fixed upon these services, except the question in regard to the accounting, do not seem to

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me to be unreasonable or improper, considering the magnitude of the estate, and the consequent importance of the questions involved and the high standing of the attorneys necessarily employed in the matter.

It is contended, however, by the contestants, that, while the executors are entitled to employ and reimburse counsel for services necessarily rendered to them, they cannot include in such charge the services of counsel in making up their accounts for judicial settlement and attending to the same, but that upon such matters they are limited to the allowance which may be fixed by the surrogate under sections 2561 and 2562 of the Code, and that, therefore, so much of this bill as includes the fee for services in the settlement of this account should be disallowed, and that the surrogate should, in the decree, make such allowance as they may be enabled to show they are entitled to within the provisions of said sections of the Code. While the reading of this section of the Code would seem to give some foundation for this claim, yet it does not seem to me, from a consideration of the entire subject, that it was the intention of the Code to limit the pay for such services to the allowance fixed by these sections, as if such had been the intention it seems to me it would have been clearly expressed.

It is unnecessary for me to consider this question at length, and give my reasons for arriving at this conclusion, as a similar question has been before Surrogate Ranson, for his determination (Matter of Smith, 26 Abb. N. C. 56), and in his opinion he completely reviews all of the decisions upon this subject, and holds that the course adopted by the executors herein is proper, using the following language: "Until I am differently instructed by the appellate court I shall hold that an accounting party is not confined to the sections of the Code (2561–2562) in remunerating his counsel, but may expend such sum as he deems proper in that behalf, to be included in his accounts." Believing that his opinion upon this subject is, therefore, correct, I shall follow the same, particularly as I am unable to find any decisions in which it has been criticised by the appellate courts.

As the amount which is involved in this account is considerable, it is to be hoped that this will be presented to the appellate courts, and thus the matter set at rest.

There remains to be determined, however, the question of

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whether the charge for the services in connection with this account was a reasonable and proper compensation, before this bill can be allowed.

Upon this point the evidence offered by the contestants is of no assistance, as the various counsel called by the contestant placed no value upon such services, stating that they regarded the sections of the Code referred to as controlling.

There was considerable difference in the opinions of the various witnesses for the executors upon the amount which should be allowed for this branch of the services. Mr. William Mitchell, the counsel for the executors, stated that he regarded the sum of $2,500 as a proper charge for these services in making up the account and attending to the accounting.

It also appears that the routine services in connection with the preparation of the account, which would naturally be attended to by an accountant, were performed by an expert accountant hired by the executors, and the bill for these services is also included in the account. It was necessary, however, for this work to be done under the direction of counsel, who also had to examine the same, and see if it was correctly arranged.

In view of the large amount of this estate, the number of bequests contained in the will, and the numerous questions, therefore, which must have arisen in the proper arrangement of this account, I think that the executors were justified in retaining eminent counsel, and also were entitled to reimburse him with a fee corresponding with the amount which he was in the habit of charging for his services in matters involving a similar amount of time and of similar importance. Upon this point the evidence offered by the executors is far from satisfactory. While they all concede that the total amount of $5,653.04 is a just and reasonable one, their itemizing of the same is very different.

Mr. Lord bases the fee to be received on the account as a nominal figure, but states that a large fee should be allowed for the general consultation during the management of the estate.

Mr. Cameron, on the other hand, states that he considers $1,500 to be a proper figure to be charged on the accounting, and fixes the fees for the other services larger than that estimated by the counsel for the executors.

As I have allowed as proper the various items of charges made by counsel for the executors for all the services, except that ren-

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dered upon the accounting, it seems to me that the fact that they may have been in the estimation of counsel underestimated, does not justify my increasing the amount which I think is proper for services upon the accounting.

I have carefully examined the account, and from such examination and a knowledge of the work which it was necessary to do in preparing same, presenting it to the court, obtaining a decree finally judicially settling same and the length of time which was involved in this transaction, I am satisfied that the sum of $1,500, the amount stated by Mr. Cameron as a proper and reasonable fee, is all that should be allowed to these executors for the employment of counsel therefor.

Accordingly, I will disallow the $5,653.04, shown in schedule C, paid by the executors for counsel fees, and will allow the sum of $4,653.04.

Let decree be presented for settlement accordingly.

Decreed accordingly.

Matter of the Appraisal, under the Transfer Tax Act, of the Property of AUGUST LISS, Deceased.

(Surrogate's Court, Kings County, October, 1902.)

Transfer tax — Deductions for expenses of administration and for taxes.

In proceedings taken to determine the value of an estate for the purposes of the transfer tax, the reasonable cost of a burial plot, proper for the decedent, as well as the cost of fencing and sodding it, must first be deducted as an expense of administration or of the funeral.

There must also be deducted taxes upon his real estate when the same were due and payable before he died and this because it is the absolute duty of executors to pay such taxes and they would be censurable if they did not pay them.

APPEAL from an order assessing and fixing the transfer tax.

Deyo, Duer & Bauerdorf, for executors.

Robert B. Bach, for Comptroller of State of New York and District Attorney of Kings county.

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CHURCH, S. The executors appeal herein from an order fixing a transfer tax upon the estate of the deceased, claiming that said estate was not subject to the tax.

The appraiser has fixed the net market value of the residuary estate at the sum of ten thousand three hundred and fifty-one dollars ($10,351), and has refused to deduct from this figure the following items:

Cost of burial plot	$470 00
Fencing burial plot	200 00
Sodding	35 00
Taxes on real estate, due October, 1901, previous to decedent's death	712 88
Making a total of	$1,417 88

If these items had been allowed, the net value of the estate would have been less than $10,000, and would, therefore, have been exempt from the tax under section 221 of the Transfer Tax Law.

Considering the items of the burial plot, and the fencing and improvement of the same, as one item, it seems clear that this amount should be deducted as an expense of the estate. The reasonable funeral expenses of the decedent are entitled to priority of payment over even debts of the deceased. A debt or an expense of administration will not be considered in estimating the amount of the tax. "The amount represented by the expenditures of the administrator or the expense of administration never passes to the legatee or next of kin, and, therefore, is not subject to the tax." Matter of Gihon, 169 N. Y. 443. Of course, if the funeral expenses are manifestly improper, so that, on the accounting of an executor or administrator, the executor or administrator would not be permitted to charge for the same, the mere fact that the executor has expended that amount is not sufficient to justify this deduction, but, if it is a reasonable expense, then it should be deducted.

The sole question, therefore, for consideration is whether the expenditure for this burial plot and the improvements to the same is a reasonable one, considering the condition and nature of the decedent's estate.

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There is no proof whatever showing that any of these items could be procured for any less sum than that stated by the administrator, and when we consider the amount of real and personal property left by the decedent, and his station in life, it seems that this amount is very reasonable and appropriate, and, therefore, should be deducted. The deduction of this amount would be sufficient to sustain the appeal, but, as the question of law raised in connection with the taxes is one of some importance, I will consider that branch of the appeal, so that it may act as a precedent in the fixing of the transfer tax in similar cases. It appears to be conceded that the item paid for taxes was actually levied, due, owing, and capable of payment at the time of the decedent's death. It was, therefore, the duty of the executors to pay these taxes, and, if they had willfully neglected to pay the same, they would be justly subject to censure. Matter of Babcock, 115 N. Y. 450; Smith v. Cornell, 111 id. 554. If the executors were bound to pay and did pay these taxes, then the personal estate was depreciated by this amount, and, therefore, did not pass to the next of kin, and, consequently, is not subject to the tax.

In the case of Krueger v. Schlinger, 19 Misc. Rep. 221, Judge Gaynor held that an executor who had paid taxes levied upon real estate previous to the decedent's death, was entitled, upon a sale in partition, to reimbursement therefor from the proceeds of the sale.

The question there for consideration was manifestly different from the situation of the case at bar, and was not made in consideration of the condition of the Transfer Tax Act, and, therefore, any expression which might be used as applying to this should not be regarded as controlling.

In Matter of Maresi, 74 App. Div. 76, the court held that taxes which were not assessed, nor a lien, nor payable at the time of decedent's death, could not be deducted in fixing the value of the estate, for the purposes of the Transfer Tax Act. The fact that the court based this decision upon the fact that the taxes were not payable at the time of the decedent's death would seem to indicate that, if they were payable at the time of the decedent's death, and had been, in fact, paid by the executors, then they could be deducted in ascertaining the value of the estate under the Transfer Tax Act. Certainly there is nothing in the opinion to indicate

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any intention to interfere with the decision in the Babcock case above quoted.

I shall, therefore, hold that taxes which are a lien, and payable at the time of a decedent's death, should be deducted from the value of the estate in order to ascertain its net value in proceedings under the Transfer Tax Act.

The appeal is, therefore, sustained.

Appeal sustained.

Matter of the Judicial Settlement of the Account of WILLIAM H. PARSONS, as Executor, Etc., of SARAH MARIA PARSONS, Deceased, by WATERMAN T. HEWETT and GEORGE BARNES, as Executors, Etc., of WILLIAM H. PARSONS, Deceased.

(Surrogate's Court, Kings County, October, 1902.)

Life estate — With power to life tenant to use the principal "for his comfort."

Under a gift and bequest, made by a wife to her husband, of the use of all the property of which she may die possessed, subject to any bequests she may name, and under the further provision that he is to have the use and income of all said property during his life and any part of the principal that may be needed "for his comfort", he is the sole judge of the amount of principal he needs for his comfort and support, and dying, next of kin of the testatrix cannot restrict the bequest by seeking to compel his executors to show what his individual income was or what sum was actually sufficient and necessary for his support and comfort.

PROCEEDINGS upon the judicial settlement of the account of an executor. Objections to account.

Rider & Smith, for petitioners.

Theall & Beam (John F. Forrester, of counsel), for objectors.

CHURCH, S. Sarah Maria Parsons died, leaving a last will and testament, which was duly admitted to probate, and William Henry Parsons, her husband, qualified as executor.

William Henry Parsons died on the 27th of June, 1902. It

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appears that he made several accountings as executor during his lifetime. In this proceeding his executors file the account of his proceedings as such executor. Said account is objected to, and the sole question for consideration turns upon the construction of the following provisions of the will of Mrs. Parsons: "I give and bequeath to my dear husband, William Henry Parsons, of said Brooklyn, New York, the use of all my property I may die possessed of, subject to any bequests I may herein name. He is to have the use and income of said property during his life, and any part of the principal that may be needed for his comfort." William Henry Parsons received the entire income of the estate, and, in addition, he had devoted certain portions of the principal to his use, on the theory that it was needed for his support, and that he had the right to do so under such will.

The executors, in their account, do not, therefore, account for any of the income received by William Henry Parsons, on the theory that it belonged absolutely to him, and they credit themselves with the sum of twenty-seven hundred and eighty-five dollars and forty-seven cents ($2,785.47), being the amount expended by him from the principal for his comfort and support, claiming that he had a right to do so under said will.

Objections were filed to this account, contending that the executors should account for the income which William Henry Parsons received in his lifetime, and that he had no right to dip into the principal of this estate unless the income thereof, or his own estate, were insufficient for his living expenses. These objections were made by three of the children of a deceased brother of Mrs. Parsons.

It is difficult for me to see what right the objectors have to be heard in this proceeding, but, inasmuch as a decision upon that point may embarrass the parties hereto, I will consider the objections which they have raised upon their merits, and will not pass directly upon the question of whether they are entitled, as next of kin of Mrs. Parsons, to object or not.

Under the will, it seems to me that Mr. Parsons was to be the sole judge of what amount of the principal of such estate he might need for his comfort and support, and that the bequest cannot be restricted by compelling his executors to show what his individual income was or what amount was actually sufficient and necessary for his support.

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If the testatrix intended to simply permit her husband to use this money provided his individual income was insufficient, and also intended that in his use of the same he should be restricted to the bare necessities and comforts of life, there is no doubt but that this provision would have been indicated by appropriate language. This has not been done, and, on the contrary, it was the evident intention of the testatrix to give to her husband the broadest discretion in his use of the principal of this estate, in addition to the use of the income thereof.

The cases quoted (Matter of Hunt, and Higgins v. Lewis) both arise under very different principles. In those cases, the bequests for the use of the income and a portion of the principal were not alone for the benefit of the executrix therein named, but also for the support of a child of the decedent.

The facts of the two cases being so radically different, the reasoning adopted in those cases has no application to the case at bar.

The objections are, therefore, overruled, and a decree should be entered proving the account as filed.

Let appropriate decree be settled, upon notice.

Decreed accordingly.

Matter of the Transfer Tax on the Estate of WILLIAM SCRIMGEOUR, Deceased.

(Surrogate's Court, Kings County, October, 1902.)

Transfer tax — Refunded when paid under a statute declared void after payment.

After the Court of Appeals has declared unconstitutional a statute (L. 1899, chap. 76) imposing a transfer tax upon certain remainders and reversions, persons who paid that tax but did not appeal within the time fixed by law from the decree imposing it may move to vacate the decree and may have their payments refunded, as the court of the surrogate has power to vacate its decree when void because rendered under a statute subsequently declared unconstitutional.

MOTION to vacate a decree assessing and fixing the transfer tax.

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William Murray, for petitioners.

William O. Campbell, for State Comptroller.

CHURCH, S. This is a motion to vacate a decree which fixed the transfer tax on the estate of William Scrimgeour, deceased, and directing the repayment of the money paid thereunder.

Were this tax to be levied at the present time, there can be no question but that it would be held to be improper, as the Court of Appeals, in Matter of Pell, 171 N. Y. 48, has decided that this specific act (L. 1899, ch. 76), under which the assessment in question was made, was unconstitutional and void.

But the granting of this motion is resisted by the counsel for the State Comptroller on the contention that the persons interested in the estate, not having appealed within the time provided by the Transfer Tax Act, have waived their right to review this question, and cannot attack this decree by a collateral motion.

The general principle contended for by the State Comptroller is unquestionably correct, and is supported by the following decisions: Matter of Schemerhorn, 38 App. Div. 350; Estate of C. Godfrey Gunther, N. Y. L. J., July 12, 1902; Matter of von Post, 35 Misc. Rep. 367. And the principle was recognized by me in the Matter of the Estate of Benjamin B. Silliman, deceased (38 Misc. Rep. 226).

But in all of these cases the motion to set aside the decree was based upon the fact that, by reason of subsequent decisions of the Court of Appeals, the theory upon which the tax had been levied in the particular estate under consideration was incorrect, and if the decision of the Court of Appeals simply placed a different interpretation as to the scope and effect of the Transfer Tax Act I should follow these decisions, and deny the motion. But in the case under consideration there is a marked distinction between it and the cases above cited, namely:

The Court of Appeals has, in the Pell case, decided that the act under which the assessment was made and the decree entered was absolutely unconstitutional and void. Therefore, the action of the court in this case is without warrant or authority in law, and, therefore, any judgment or decree of this court entered without jurisdiction and under a void statute may be held void.

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12 Am. & Eng. Encyc. of Law, 311; People ex rel. Powder Co. v. Feitner, 41 App. Div. 544.

If the tax had not yet been paid under this decree, the Comptroller could not proceed to enforce it, and it would be perfectly proper for the court to set it aside on the ground of its invalidity, so that it would not be a seeming cloud upon the legacy.

The mere fact that the party has complied with the decree and paid the money cannot operate to validate what would otherwise be a void decree, or rather to validate action taken under a void decree.

The Surrogate's Court has power to vacate its judgments and decrees where they have been made without jurisdiction, and where they are void because they are rendered under statutes which have subsequently been declared unconstitutional. Matter of Flynn, 136 N. Y. 287; Freem. Judgm. (4th ed.), 188. "The decided preponderance of authority justifies or rather requires, a court, on motion being made to vacate its judgment because it was without jurisdiction over the person or the subject-matter, to inquire whether such is the fact, and if so, to grant the relief sought."

The motion to vacate the decree in question is granted, and an order will be entered directing the Comptroller to refund the taxes heretofore paid thereunder.

Motion granted.

Matter of the Transfer Tax upon the Estate of SOPHIA HOSACK, Deceased.

(Surrogate's Court, New York County, October, 1902.)

Transfer tax — On contingent or defeasible estates in expectancy — Retroactive force of L. 1902, chap. 496.

The language of the Tax Law (L. 1896, ch. 908, § 230 as amd. L. 1901, ch. 173; 1902, ch. 496), that "Estates in expectancy which are contingent or defeasible * * * where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof", indicates a legislative intention to make that part of said section 230 retroactive,

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and therefore the fact that an appraisal for the transfer tax was had in the estate of a testatrix in 1891 does not entitle the owners, or their representatives, of contingent or defeasible estates in expectancy, created by the will, and which vested in beneficial enjoyment or possession on or after May 7, 1902, to pay the tax on their shares upon the values thereof as determined in 1891 — and a new appraisal as to the value of their shares is necessary.

APPLICATION to fix the tax on the respective shares, on the basis of their valuations, as of the death of the testatrix, ascertained in 1891, and without any new appraisal.

Edward H. Fallows, for State Comptroller.

Turner, Rolston & Horan, for contestants.

THOMAS, S. The testatrix died April 22, 1891. By her will she created certain trusts, under which Angelica Church and Mary Helen Church were entitled to the income of funds created for their benefit, respectively, and to the principal thereof, if and when they respectively attained the age of thirty years, but if they failed to reach that age, then other persons were to take. Both of said persons were also entitled to remainder interests after other life estates, conditioned on their surviving. An appraisal of the estate for the purpose of fixing the transfer tax was had in 1891, but the tax on the interests of Angelica Church and of Mary Helen Church was then postponed, for the reason that it was not then known, and could not then be ascertained, to whom their shares or parts would ultimately pass, or whether the same were subject to the tax imposed by said act. Angelica Church came of the age of thirty years on May 7, 1900, and thereafter, on June 8, 1902, she died. Mary Helen Church became of the age of thirty years on July 28, 1902. The present application is to fix the tax on their respective shares, on the basis of the valuations, as of the death of the testatrix, ascertained in 1891, and without any new appraisal. By chapter 284 of the Laws of 1897, the General Tax Law (Laws of 1896, chap. 908, § 230), was amended so as to provide that "Estates in expectancy which are contingent or defeasible shall be appraised at their full undiminished value, when the persons entitled thereto shall come into the possession thereof,

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without diminution for or on account of any valuation theretofore made of the particular estates for the purposes of taxation, upon which said estates in expectancy may have been limited." Subsequent to this amendment, and in 1897, a life beneficiary under this same will, whose life estate had been taxed in 1891, died, and an application was made to Surrogate Arnold to tax the transfer of the remainder interest. Surrogate Arnold then held that the amendment of 1897, above set forth, was not retroactive, and, therefore, had no application to this estate, for the reason that the Legislature had not declared an intention to make it retroactive. Estate of Sophia Hosack, N. Y. L. J., Nov. 22, 1897, citing Matter of Miller, 110 N. Y. 223. In 1899, section 230 of the law was again amended (Laws of 1899, chap. 76), and the provision in question was dropped. A further amendment made in 1901 (Laws of 1901, chap. 173), restored the provision in the following words: "Estates in expectancy which are contingent or defeasible (and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance) shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited." The section was again amended, in other particulars, in 1902 (Laws of 1902, chap. 496), and the clause in question was re-enacted in the same words. It will be observed that the words in parentheses were not contained in the amendment of 1897, and they would seem to have been inserted, in 1901, for the express purpose of avoiding the application of Surrogate Arnold's reasoning. It can now hardly be said that, in directing the provision to have application to transfers of estates in expectancy "where the taxation thereof has been held in abeyance," the law-making body did not clearly intend to make its language apply to cases where the rights under the transfer had been established and proceedings had been initiated for the imposition of the tax, before its enactment. I must determine here, as I did in Matter of Connoly, 38 Misc. Rep. 533, that the law now in force is retroactive, and that it has application to this estate. As I intimated in the Connoly case, I agree that the question of the constitutionality of the statute, as so construed, is an

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interesting one, and not entirely free from doubt (Matter of Pell, 171 N. Y. 48, rev'g 60 App. Div. 286), but I will sustain the law on the ground that a statute should not be pronounced void by a court of first instance. The application to fix the tax without appraisal is denied, and an appraiser will be appointed.

Application denied.

Matter of the Transfer Tax on the Estate of WILLIAM C. HORN, Deceased.

(Surrogate's Court, New York County, October, 1902.)

Transfer tax — Debt on open account due a non-resident decedent from a domestic joint stock association not taxable — Domestic life insurance policies payable to the estate of such a decedent not taxable.

A debt on open account due by a domestic joint stock association to the estate of a non-resident decedent, at his death its president and the owner of a majority of its stock, is not subject to the transfer tax for the reason that it is a mere chose in action whose *situs* is the domicile of the decedent.

Policies by which domestic corporations insured the life of such a decedent for the benefit of his estate, kept by him in the State of New York and which were here when he died, are not subject to said tax as they cannot be deemed property capable of having a *situs* apart from the person of the payee.

APPEAL from an order fixing the transfer tax.

Abraham D. Levy, for State Comptroller.

Atwater & Cruikshank, for executors.

THOMAS, S. This is an appeal from an order fixing the transfer tax. The decedent, a resident of New Jersey, died April 11, 1902, leaving a will whereby he gave all of his estate to his widow and children. He was president of a joint-stock association, known as Wm. C. Horn, Bro. & Co., having an office in the city of New

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York, and owned 1,120 of the 2,000 shares into which the stock was divided. The appraiser assessed his stock as representing property in this State, the transfer of which is subject to taxation, and no objection is made to this. At the time of his death the association was indebted to him in the sum of $22,469, on open account, and the appraising of this amount as taxable is challenged as improper and is specified as one of the grounds of this appeal. Regarded as a debt due from a resident to a nonresident decedent, the account is not taxable. With respect to property of nonresidents, the right of the State to impose the tax arises from its jurisdiction over property within the State. Matter of Bronson, 150 N. Y. 1, 6; Tax Law, § 220, subd. 2. A mere chose in action, a right to recover a sum of money, has never as yet been given the attribute of tangibility, and for the purposes of the statute taxing transfers, it has always been treated as having no *situs* other than the domicile of the creditor. Matter of Phipps, 77 Hun, 325, affd., on opinion below, 143 N. Y. 641; Matter of Chabot, 44 App. Div. 340; affd., 167 N. Y. 280. In Matter of Houdayer, 150 N.Y. 37, money deposited by a decedent in a trust company, created under the laws of this State, and subject to repayment on demand, was held to be "property in this State for all practical purposes, and in every reasonable sense within the meaning of the Transfer Tax Act." The "substance" of the transaction was determined to be to leave the money in this State for safer keeping, and the general doctrine that a right of action belonging to a nonresident, though enforcible against a resident, is not property in this State, was reiterated and sustained. The argument of the Comptroller that the money represented in the account "was practically invested here, it being due from the decedent's own company," does not impress me as sound. The interest of the decedent in the property of the company was represented by his stock and has been fully appraised and taxed. The company was not "his," though he owned a majority interest in it, and his claim against his associates was a mere chose in action and not taxable.

After the decedent's death certain policies of insurance on his life, issued by New York companies and payable to his estate, were found in a safe in this city. Where they were issued does not appear. They have been collected in New York and the amount represented by them has been included in the property assessed to determine the tax. Such assessment is

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specified as a further ground for this appeal. In Matter of Abbett, 29 Misc. Rep. 567, Mr. Surrogate Varnum determined that policies of life insurance, issued by life insurance companies of this State on the lives of nonresident decedents, when such policies are not within the State, are not subject to the transfer tax. I am satisfied with his reasoning and with his decision, and will adopt his conclusion. A policy of life insurance is evidence of a right of action and is taxable as an asset of the estate of a deceased resident to whom it is payable. (Matter of Knoedler, 140 N. Y. 377), but it is not taxable if payable to a nonresident decedent, on the mere ground that the debtor is a New York corporation. It remains to be considered whether the rule will be otherwise where, as in this case, the policy is kept by the decedent in this State and is here at the time of his death. In Matter of Whiting, 150 N. Y. 27, the bonds issued by foreign, as well as by domestic corporations, kept by the decedent in this State and found here on his death, were determined to be properly included in the appraisement to fix the transfer tax. The theory upon which the court proceeded to judgment was that the written instruments were physically within the State, and constituted property here subject to taxation. They were regarded as tangible and apparently in the nature of chattels. A bond, by the terms of which a corporation obligates itself to pay, absolutely and at all events, a specified sum of money, differs substantially from a contract of life insurance. A policy of life insurance, is not evidence of debt absolutely payable. By its own terms it is payable not absolutely, but conditionally. It admits no existing debt, but agrees that one may arise if certain specified conditions are performed. It is none the less a conditional contract, although ultimately there may grow out of it an absolute liability. It has, therefore, been held that it is not "evidence of debt for the absolute payment of money or at a particular time" within the meaning of the provision in the Code of Civil Procedure requiring an order of a judge that the issues on the pleadings in an action upon it be tried. New York Life Ins. Co. v. Universal Life Ins. Co., 88 N. Y. 424. It has also been adjudged that it is not "an instrument for the payment of money" within section 649 of the Code of Civil Procedure, and that the sheriff may levy upon the cause of action evidenced by it without taking the policy into his actual custody. Kratzenstein v. Lehman, 19 App. Div. 228. Such

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a policy of insurance is, indeed, nothing more than written evidence of a contract by the terms of which the company issuing it promises to pay a sum of money on certain conditions thereafter to be performed, and in the happening of the contingency of death therein specified. It is a most material item of evidence, but is only a part of the perfected cause of action, leaving proof of other matters to be supplied. It cannot be determined to be in itself property of a kind capable of having a *situs* apart from the person of its payee, except upon principles which have not yet received the approval of the courts of this State. The appeal is sustained and the order fixing the tax will be modified accordingly.

Appeal sustained and order fixing tax modified.

Matter of the Transfer Tax upon the Estate of CORDELIA P. THOMAS, Deceased.

(Surrogate's Court, New York County, October, 1902.)

Transfer tax — A power of appointment given a domestic testatrix by a foreign will over foreign property and exercised by her under foreign law is not taxable.

Where a non-resident testator, whose property was and remained wholly in the State of his domicile, after creating by his will, in trustees resident there, a trust for his daughter for life, gave her power to appoint the remainder after the trust, the surrogate considered that the exercise by her, at her death a resident of the State of New York, of this power by a will executed and proved here, did not, under L. 1896, ch. 908, § 220, subd. 5 as amended in 1897, subject the shares of her appointees to the transfer tax, and this because the property had been wholly without this jurisdiction, the laws of the foreign State had controlled the whole matter, there had been no transfer under our laws and none whatever beyond the fact shown that the foreign trustees, when so ordered by the foreign court acting under the daughter's will which had been probated therein and followed thereby, paid her appointees their shares.

APPEAL from an order fixing and assessing the transfer tax.

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Oudin & Oakley, for appellant.

Edward H. Fallows, for State Comptroller.

THOMAS, S. By the will of Edwin L. Parker, the father of the decedent and a resident of Baltimore county, in the State of Maryland, made and proved in Maryland in 1868, he devised and bequeathed one-half of his residuary estate to three trustees, then and at all times thereafter residents of the State of Maryland, upon a trust to keep the same invested and pay the income to the decedent during her life, and after her death to "pay or transfer the same in such manner as she, by her last will and testament, whether married or unmarried, may direct, and in default of such last will and testament to such person or persons as, by the laws of Maryland, may be entitled to the same as her heirs." The decedent married, and died on January 17, 1902, being then a resident of the county of New York. She left a will by which she appointed six legacies of $1,000 each to be paid out of her father's estate to nephews and nieces, and all of the balance of her individual estate and of the interest in her father's estate, subject to her power of appointment, she gave and appointed to her husband. This will was admitted to probate here, and was subsequently treated by the Circuit Court of Baltimore city as a valid execution of the power of appointment contained in her father's will, by the making of a decree that the trustees under the will of her father pay over the fund in their hands to her appointees. This decree was carried out, and under it assets appraised as being of the value of $76,018.19 were transferred. All of the assets were from the time of the death of the father in the State of Maryland, and remained in that State until delivered by the trustees under this final decree. The individual property of the decedent was of the value of $6,176.23, and passed to her husband. The appraiser appointed in a proceeding to assess the transfer tax included in his appraisal the amount of the fund passing from the trustees of the father's estate, and an order was made confirming his report and fixing the tax accordingly. The executor of the will of the decedent and all the persons charged with the tax now appeal from that order.

The provision of law under which the appraiser acted is subdivision 5, section 220 of article X of the Tax Law, as amended

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by chapter 284 of the Laws of 1897, which is as follows: "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment, when made, shall be deemed a taxable transfer under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will." The will of Mr. Parker is certainly included in the phrase "any disposition of property," and the power of appointment was derived from it. A strictly literal construction of the statute would require the imposition of the tax, but I cannot think that the Legislature intended such a result, as applied to the facts of the present case, and I am of opinion that, if it did, the statute cannot be enforced. In all of the cases it is quite clearly asserted that the tax is one, not upon property, but upon transfers of property made by will or descent, where the right to make or receive such transfers is accorded by the laws of this State, and which right the sovereign power of this State may lawfully abridge by the amount of the tax. It was upon this ground that the provision of law now under consideration was determined to be constitutional. Matter of Vanderbilt, 50 App. Div. 246, 252; affd., 163 N. Y. 597; Matter of Dows, 167 id. 231.

In the present case no transfer of any kind of any part of the assets of the estate of Edwin L. Parker, in the hands of his trustees at the time of the death of his daughter, has been effected or permitted by any law of the State of New York. All of those assets were in the State of Maryland, held by trustees residing in Maryland, under a will of a citizen of Maryland, pursuant to the laws of that State. It is true that the will of the decedent which effected the appointment was executed here, but it derived none of its force or validity from our law. Its legal effect depended entirely upon the law of Maryland, and if its probate in this State was necessary or useful for any purpose, it was only because the law of the State of Maryland so declared. Blount v. Walker, 28 S. C. 545; Olivet v. Whitworth, 82 Md. 258; Betts v. Betts, 4 Abb. N. C. 317, 388, 389. The power to impose conditions or to affix a tax upon the transfers effected by the power of appointment and its due execution rested exclusively with the State of Maryland, since that State accorded every right asserted by the parties.

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The property which belonged to the decedent and which passed as hers, under our laws, was less than $10,000; it was bequeathed to her husband, and the transfer is exempt from tax.

The appeal is sustained.

Appeal sustained.

Matter of the Accounting of the Trustees of the Estate of HARRY HOLBROOK, Deceased.

(Surrogate's Court, Westchester County, October, 1902.)

Trustees, several — Entitled to only one commission on annual income unless it amounts to $100,000.

Unless a trust estate's annual income amounts to $100,000, the trustees, however numerous, are together entitled to only one commission on the income.

PROCEEDINGS upon the accounting of trustees.

Grant Notman, for trustees.

Anson Baldwin, special guardian.

SILKMAN, S. The claim is made by the trustees that they are each entitled to a full commission upon the income, although the aggregate annual income is much less than $100,000.

Prior to the amendment of section 2736 of the Code of Civil Procedure in 1892, not more than one full commission upon income could be allowed upon the accounting of either executors or trustees where there were more than one, unless such income amounted to $100,000 or more annually. Matter of Willets, 112 N. Y. 289. That section then read: "Where the value of the personal estate of the decedent amounts to one hundred thousand dollars or more, over all his debts, each executor or administrator is entitled to the full compensation (on principal and income) allowed by law to a sole executor or administrator, unless there are more than three, in which case the compensation to which three would be entitled shall be apportioned among them according to the services rendered by them respectively; and a like apportionment shall be made in all cases where there shall be more than

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one executor or administrator." The words in parentheses were not in the original section, but were added by the Laws of 1892, chapter 636.

By section 2811 of the Code of Civil Procedure this section 2736 was declared to apply to trustees as well as to executors. If this section 2736, as then amended, and with the words "on principal and income" interpolated, became a part of section 2811, it remained so only until the next session of the Legislature, when sections 2734 to 2741 inclusive, were repealed, and section 2730, which in terms applied to executors only, was amended to include the substance of sections 2734 and 2741. Laws of 1893, chap. 686.

This Legislature of 1893 left section 2811 as it was with its reference to section 2736. What the Legislature really intended, it is difficult to say; whether by the repeal of section 2736 they intended to repeal the reference to it contained in section 2811, or whether it intended section 2736 should continue to be read as amended into section 2811; or whether the intent of the repeal was to destroy the amendment of 1892, and leave section 2811 to be read with its reference to section 2736 as originally enacted. The latter, I think, is the only construction which it is fair to adopt.

It can hardly be that by oversight or inadvertence section 2811 with its reference to section 2736 has been allowed to remain in its present form for so many years.

Nevertheless, we find in section 2811 a reference to section 2733. The original section 2733 related to the form of affidavit to be attached to an executor's account, but in the convulsion of 1893 when the Legislature altered some sections and repealed others, we find an entirely new subject covered by section 2733, namely, advancements, with which trustees have nothing to do, and which is something to be wholly disposed of before the trustees as such take possession of the estate.

The Court of Appeals in Hurlburt v. Durant, 88 N. Y. 122, held that the then sections 2736 and 2811 of the Code contained the statutory provisions for the compensation of executors and testamentary trustees.

In the Matter of Todd, 64 App. Div. 435, the court say: "Sections 2802 and 2730 of the Code of Civil Procedure clearly contemplate that the estate shall be charged certain fees for the receiving and paying out of the money coming into the hands of the trustee." The court apparently follows section 2736 in its

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consolidation with other sections into section 2730, and finding further authority in section 2802 for allowing trustees the same commission as executors. The facts in the Todd case did not necessarily call to the attention of the court the confusion in the legislation, and it was not necessary to the decision of that case that the court should have considered it.

Section 2802 would seem to relate entirely to annual accounts of trustees, and these accounts must necessarily be accountings of income; and if, under the authority of that section, trustees are to have the same compensation as executors, then we must regard the income as a separate and distinct fund from the principal for the purpose of determining such compensation, and which construction is consistent with the view which I hold.

I do not think that even if section 2736 stood to-day as amended in 1892, it would authorize the granting of more than one commission upon income to trustees where such annual income was less than $100,000. I think the object and intent of the amendment of 1892 was to obviate the question which had arisen frequently in surrogates' courts, namely, could the surrogate, in determining whether the amount of the estate was more or less than $100,000, add the income received by executors to the amount of the estate as it came into their hands upon the death of the testator. In order to set at rest the doubt upon this point the Legislature directed that such income might be included with the principal. In enacting section 2811, making the provisions of section 2736, with other sections, applicable to trustees as well as executors, it was only intended to make the application so far as it might be pertinent and reasonable.

Executors and administrators collect income merely because they are for the time being possessed of the assets of decedent for the purposes of administration, and of necessity must receive the income during that limited period. Their commissions are calculated upon the estate in their hands as one fund. With trustees it is different. The principal and the annual income are separate funds. The trustees are entitled to commissions upon principal at the statutory rate of 5 per cent. on the first thousand, 2½ per cent. on the next 10,000, and 1 per cent. on the balance. They are also entitled to treat each year's income as a separate fund for the purpose of arriving at the commissions calculated in the same way.

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If we are to accept the construction claimed here by the trustees, then we must regard the principal and income in the hands of the trustees as one fund, and having had their 5 per cent. on the first thousand, and 2½ per cent. on the next 10,000 once, they cannot have it twice, and on all subsequent income the commissions can only be allowed upon the 1 per cent. basis.

Counsel for the trustees also claim that the rule laid down in Matter of Willets, *supra,* has been abrogated by the amendment of 1892 to section 2736. I do not think that the Legislature intended to alter the wise and salutary rule regulating trustees' commissions on income laid down in that case. The court there say: "When trustees account in reference to commissions which they are required *annually* to pay over and account for, no matter how much the principal may be or how much the estate of the decedent may have been, section 2736 does not apply, unless the income exceeds one hundred thousand dollars, and more than one commission can be allowed only in case the sum, upon which commissions are computed amounts to at least one hundred thousand dollars."

The decree may provide for the allowance of one commission upon income to be divided between the three trustees, calculated with annual rests at the rate of 5 per cent. on the first thousand, 2½ per cent. on the next 10,000, and 1 per cent. upon the balance.

Decreed accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* MICHAEL E. FOODY, Defendant.

(Court of General Sessions of the Peace in and for the County of New York, October, 1902.)

Crimes — Denial of a motion, addressed to the discretion of the court, to dismiss before trial an indictment against a public officer.

A motion, to dismiss an indictment of a captain of the police force of the city of New York for willful neglect of duty made before trial and addressed to the discretion of the court, will not be granted where the court cannot say as matter of law that the evidence is insufficient to justify the grand jury in finding the indictment and where it also appears that a general suspicion of police officials exists in the community.

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Misc.] Court of General Sessions, New York County, October, 1902.

MOTION to dismiss an indictment, pursuant to section 671 of the Code of Criminal Procedure.

Black, Olcott, Gruber & Bonynge, for motion.

William Travers Jerome, District Attorney, opposed.

FOSTER, J. Though this motion was argued before me in July last the papers did not reach me in completed form until October 24, 1902.

The defendant is a captain of the police force of the city of New York, and moves on the minutes of the grand jury, to dismiss or set aside the indictment herein on the ground that it was found upon insufficient evidence. This indictment is for willful neglect of duty. The evidence before the grand jury is not as clear and convincing as might be desired, yet I must deny this motion for two reasons, which, because of the importance of the case ought, perhaps, be briefly stated.

First.— I cannot say *as a matter of law* that the evidence was not sufficient to justify the grand jury in their view of it. If there is evidence, then the force and weight and the credence to be given it is for the jury alone and not for the court.

Second.— The defendant is a public officer, a captain of police. There appears to be a very general suspicion of police officials, though whether well grounded I neither know nor declare, and for this reason, if for none other, this accusation, made by the grand inquest of this county under the solemnity of their oaths, ought not to be disposed of on a motion *addressed to the discretion* of the court.

On this subject I said in People v. Spolasco, 33 Misc. Rep. 530 (15 N. Y. Crim.), and it applies as well here: "Public interests and the furtherance of justice alike, require the *publicity of a trial,* so that the whole truth as to these serious accusations may be known to all men."

The motion here made may be as well determined on trial as before, and my decision in no way prejudices and is in no way intended in any manner to prejudice any of the defendant's rights; nor to permit the People, when a like motion shall be made at the trial, to assert it is *res adjudicata.*

Motion denied.

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RICHARD F. LEASK, Plaintiff, *v.* SAMUEL J. HORTON and Wife, Defendants.

(Supreme Court, Nassau Special Term, October, 1902.)

Deed — Seal not requisite.

A conveyance of real estate in fee in the State of New York does not require a seal since the passage of the Real Property Law (L. 1896, ch. 547).

SUIT in equity to compel the defendants to make and deliver to the plaintiff a deed of conveyance of certain real estate in fee. They executed and delivered to the plaintiff an unsealed conveyance, but he claims that that does not convey title.

William Willett, Jr., for plaintiff.

Frederick L. Gilbert for defendants.

GAYNOR, J.: The question is whether a deed, i. e., a writing under seal, is still necessary to convey real estate in fee. At first in England such conveyance could be without any writing, viz., by certain overt acts constituting livery of seisin. Afterwards a written conveyance by the grantor signed with his name or the sign of the cross or both came into use. After the Conquest the grantor's seal without signing sufficed according to the Norman custom, each having a distinct seal. In this way it came finally to be the common law that a seal was necessary but signing was not. So it remained until the enactment of the statute to prevent frauds (29 Car. II, c. 3; re-enacted in this state by ch. 44, L. 1787), which in express words made signing necessary. Though this statute requiring signing was silent about sealing, it was held not to do away with the common law requirement of sealing, but only to create the additional requirement of signing (Jackson v. Wood, 12 Johns. 73; 2 Bl. Com. 305; 4 Kent's Com. 450; 3 Wash. Real Prop. ch. 4, § 2).

This was the state of the law until our revised statutes of 1830 were enacted. It was therein provided (1 R. S. p. 738, § 137)

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that a conveyance of land in fee should be "subscribed" (i. e., signed at the end, instead of the writing of the name in any part sufficing, as was held to be the case under the statute of frauds, which formerly only used the word "signed"), and sealed (James v. Patten, 6 N. Y. 9). The enactment was that "Every grant in fee or of a freehold estate shall be subscribed and sealed", etc. It was entirely new, and (as may need to be observed) no part of the statute of frauds, but a separate and independent enactment. The statute of frauds is found entire, including the provisions thereof relating to real estate, and referred to above, in another part of the revision, but with the word "signed" changed to "subscribed".

The said section 137 of the revised statutes remained in the same words until the revision in 1896 (ch. 547) in one statute called the Real Property Law of all statutes relating to real property. Section 208 of this law, which is the substitute for the said section 137 of the revised statutes, dropped the words "and sealed". It is claimed that this changed the law, and that to subscribe now suffices without sealing.

If the original enactment in the said section 137 of the revised statutes had only been that the conveyance should be subscribed, nothing being mentioned about sealing, that would not, it seems, have done away with the common law requirement of a seal, any more than the prior enactment in the statute of frauds requiring signing had done; it would only have been the addition to the common law requirement of sealing of another requirement. It would not have abrogated the common law requirement of a seal by repugnancy. But the enactment was that it should be subscribed and sealed, thus being a declaration of all of the law on the subject, viz., of the common law requirement of sealing, and the statute requirement of subscribing. The dropping of the words "and sealed" from the said revision of 1896 may therefore denote a legislative intention which an omission of such words originally would not have denoted, i. e., to do away with the requisite of sealing.

But it is claimed that in giving this construction to the said section 208 we encounter the rule that the repeal of a statute provision either declaratory of or repugnant to the common law is a return to the common law (Sutherland Stat. Constr. § 168; Lowenberg v. People, 27 N. Y. 336); and that therefore the

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repeal by such section of the statute requirement of a seal, by the dropping of the words "and sealed", is a return to the common law requirement of a seal. While this rule is still in existence, not being abolished by statute (Stat. Constr. L. § 31), I do not think we get foul of it. We go to one side of it by another rule. The said section 137 of the revised statutes of 1830 by embracing the whole subject matter took it out of the realm of the common law and into the realm of statute law; and when that is the case with a statute, while the entire repeal of it revives the common law which it repealed or was declaratory of, a change of it by revision is a change of the law. In other words, the revision of a statute which embraces an entire subject is also construed to embrace the entire subject, i. e., to take the place of the prior statute and operate exclusively, the same as it did (Sutherland Stat. Constr. § 154; Com. v. Cooley, 10 Pick. 37; State v. Wilson, 43 N. H. 415).

A subsequent part of the Real Property Law seems to manifest a contrary intention. Section 223 makes lawful a short form of conveyance which it sets out in full, and which is there labelled "Deed With Full Covenants" at its top, and ends with the following attestation clause: "In witness whereof the said party of the first part hath hereunto set his hand and seal", etc.; the intention that the conveyance should be sealed being thus apparently twice expressed. The same section permits any other form to be used, but it is not conceivable that the legislative intention was that though such short form if used should be sealed all other forms need not be.

But on the whole these apparent manifestations of intention contrary to that manifested by section 208 are not real, but the result of sheer slovenliness in the draftsman. The said label is not part of the form, and the word "deed" was unscientifically used in the sense of conveyance. Nor is the attestation clause a substantial or necessary part of the form; and the mere fact of its calling for a seal is not wholly inconsistent with seals being made unnecessary but merely optional in the same statute.

Judgment for the defendants.

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Matter of JAMES F. GILLESPIE *v.* JOHN T. McDONOUGH, Secretary of State.

(Supreme Court, New York Special Term, October, 1902.)

Election Law — Nomination by the committee of a political party of a candidate already nominated by a convention of another political party — Determination of the Secretary of State, as to the validity of the nomination, where reviewable.

The Election Law (L. 1896, ch. 909) regards a nomination made by a party committee as of equal dignity and originality with one made by a convention and, therefore, although the Democratic party has in convention nominated a candidate for a State office, the Secretary of State cannot lawfully refuse to file, as invalid, a certificate of the subsequent nomination of the same man for the office by the duly authorized committee of a convention of the Prohibition party to fill a vacancy left by its convention — there being no case for the application of that part of section 66 of said law which provides, in substance, that when no nomination shall have been originally made by a political party it shall not be lawful for any committee of such party, authorized to make nominations, to nominate or substitute the name of a candidate of another party for such office; it being the intention of the law, as therein stated, that when a candidate of one party is nominated and placed on the ticket of another party such nomination must be made at the time and in the manner provided for making original nominations by such party.

Under section 56 of said law, a citizen and Prohibitionist voter who resides in the first judicial district may review there the adverse determination of the Secretary of State although he resides in the third judicial district.

THE Prohibitionist State convention nominated a full State ticket with the exception of a candidate for Attorney-General. This place on the ticket was left blank and a committee was appointed by the convention to fill the vacancy. A different committee was appointed for the purpose of filling possible vacancies by death, declination, etc. Thereafter, on October 1, 1902, John Cunneen was nominated by the Democratic State convention for the office of Attorney-General. On October second, the Prohibitionist

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committee for the purpose of nominating a candidate for that office met. On October third, it executed a certificate of nomination of John Cunneen. On the same day the certificate of Cunneen's Democratic nomination was filed with the Secretary of State. It did not appear whether the execution of the Prohibitionist certificate preceded or followed the filing of the Democratic certificate. On October fourth, the Prohibitionist certificate was filed. The Secretary of State ruled that the latter certificate was invalid because it was a committee nomination of a candidate who had already been nominated by another political party. Mr. Gillespie, a Prohibitionist voter, residing in the county of New York, thereupon applied for an order directing the Secretary of State to place the certified Cunneen name as a Prohibitionist candidate.

Edward B. Whitney and Coleridge A. Hart, for application.

C. C. Van Kirk and Job E. Hedges, opposed.

BISCHOFF, J. The questions involved in this application are two, the first relating to the jurisdiction of the court in this judicial district to entertain the application, the second affecting the merits, and both in their solution resting upon the proper construction to be given to sections of the Election Law of the State (L. 1896, ch. 909). The Prohibition party nominated, in State convention, all candidates for office except for Attorney-General. Under section 56 of the Election Law the same convention appointed two committees, the first to nominate a candidate for Attorney-General, the second for the purposes enumerated under that section. No question is raised upon this application as to the regularity of the convention, or the powers delegated to the committee appointed by it to carry out its duties as prescribed by law, nor is any objection raised to the formal execution of the papers by this committee in the course of its duty. The Democratic convention, on October first, nominated John Cunneen for Attorney-General, and on October second the committee of the Prohibition party nominated the same candidate for that office. The proper certificate (Election Law, § 56), was executed by this committee on October third, the same day on which the Democratic nomination of the same nominee was filed with the Secretary of State, and on the following day the Prohibition nomination was also filed with the Secretary of State.

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Aside from the question of jurisdiction, the main matter presented and urged against the Prohibition nomination filed with the Secretary of State was sustained, and upon the ground that as at the time the Prohibition nomination was filed Mr. Cunneen was the candidate of the Democratic party, he could not, under the Election Law, become as nominated the candidate of the Prohibition party. The question of jurisdiction raised as a preliminary objection should be considered first. This relates to the proper construction to be placed upon these provisions, under section 56 of the Election Law: "Any questions arising with reference to any device, or to the political party or other name designated in any certificate of nomination filed pursuant to the provisions of this section, or of section fifty-seven of this article, or with reference to the construction, validity or legality of any such certificate, shall be determined in the first instance by the officer with whom such certificate of nomination is filed. Such decision shall be in writing, and a copy thereof shall be sent forthwith by mail by such officer to the committee, if any, named upon the face of such certificate, and also to each candidate nominated by any certificate of nomination affected by such decision. The supreme court, or any justice thereof, within the judicial district, or any county judge within his county, shall have summary jurisdiction, upon complaint of any citizen, to review the determination and acts of such officer, and to make such order in the premises as justice may require, but the final order must be made on or before the last day fixed for filing certificates of nomination to fill vacancies with such officer as provided in subdivision one of section sixty-six of this article. Such a complaint shall be heard upon such notice to such officer as the said court or justice or judge thereof shall direct." It is contended that under these provisions this court, within the first judicial district, has not jurisdiction to entertain the application, but that as the Secretary of State is within the third judicial district relief should have been sought of the Supreme Court, or any justice thereof within the third judicial district, or of the county judge of Albany county. That the right to apply for relief by applicants is not so limited seems well established by authority (Matter of Fairchild, 151 N. Y. 361) as well as by principle. The case cited clearly holds, applied to the case at bar, that the application need not have been made necessarily in the third judicial district,

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though without deciding authoritatively where else relief could be sought. The moving papers show that complainant Gillespie is a citizen of the State and resides in the borough of Manhattan in the county of New York. Thus is presented the question of where the decision of the Secretary of State must be reviewed on the application of a resident of New York county. The Fairchild case, as suggested, holds that it need not be in the third judicial district, and it would seem to me, under the language of section 56 of the Election Law above recited, that this court in New York county has jurisdiction of the subject-matter. The review contemplated by the provision under the Election Law is in the nature of an appeal from a quasi-judicial determination of the Secretary of State in passing upon the validity or legality of the certificate offered, and the true interpretation of the language of the act in my judgment cannot be deemed to give the exclusive right of review of the acts of the Secretary of State on filing all certificates of candidates for State office to the Supreme Court or judge thereof of the third judicial district, or the county judge of Albany county. The true import of the language seems to be that upon the complaint of any citizen, the Supreme Court, or any justice thereof within the judicial district, *i. e.*, of the citizen, or any county judge within his county shall have summary jurisdiction. This in no way does violence to the language, effects a convenient remedy for review, and is consistent with well-known conditions rendering a speedy determination of such questions of the utmost importance. The argument that such construction would necessitate the Secretary of State appearing in widely different parts of the State to protect his interests on various nominations sought to be reviewed can have but little weight in view of the well-known fact that the Secretary of State takes but little, if any, active part in these controversies. As in the case at bar the real controversy is usually waged by contending political parties, though nominally the review may be sought, as the statute requires, in the name of an individual, and the real relation of the Secretary of State is analogous to a court of first instance, and his attitude may well remain in most instances wholly passive. The Legislature could scarcely be considered as acting without knowledge of these conditions, and should not be held to have granted the exclusive right of review of nominations for State offices to any particular judicial district court or judge without

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the clearest expression of such intention in the language used, and certainly the true construction of section 56 of the Election Law will fairly bear no such interpretation, though concededly ambiguous in its terms.

The question affecting the merits of the application involves the construction of the following part of section 66 of the Election Law: "When no nomination shall have been originally made by a political party, or by an independent body for an office, or where a vacancy shall exist, it shall not be lawful for any committee of such party or independent body authorized to make nominations, or to fill vacancies, to nominate or substitute the name of a candidate of another party or independent body for such office; it being the intention of this act that when a candidate of one party is nominated and placed on the ticket of another party or independent body, such nomination must be made at the time and in the manner provided for making original nominations by such party, or independent body." The Secretary of State ruled that because at the time when the certificate was filed on behalf of the candidate for Attorney-General by the Prohibition party, Mr. Cunneen was already the candidate of the Democratic party he could not be nominated by such Prohibition committee. The controversy turns on the language used in section 66 of the Election Law: "When no nomination shall have been originally made by a political party, or by an independent body, for an office, or where a vacancy shall exist." As I understand it, the reason for the conclusion reached by the Secretary of State was in substance that the language intended by "original nominations," means only those made by a convention of a political party as distinguished from those made by a committee appointed by a convention. It does not appear that the Legislature has in any way defined the phrase "originally made by a political party," in express terms, nor does it appear in the context that any intention is shown to distinguish between nominations made by conventions or committees of conventions as original nominations, but, on the contrary, the Legislature has provided by express enactment two ways or means of making nominations, the first by convention, and the second by a duly authorized committee of such convention. See Election Law, § 56. After so providing the law makes no distinction as to either in respect to its being original or secondary. It treats both on an equality, and in formal matters distinguishes

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only so far as to make the credentials of either authoritative on their face when presented to the Secretary of State: "Sec. 56. Party nominations: * * * Party nominations of candidates for public office can only be made by a convention, or by a duly authorized committee of such convention of a political party. * * * The party certificate whereby such party nominations are certified shall contain the title of the office. * * * It shall be signed by the presiding officer and a secretary of such convention or primary, or if made by a committee by a majority of the members thereof. * * * When the nomination is made by a committee, the certificate of nomination shall also contain a copy of the resolution passed at the convention or primary which authorized such committee to make such nomination. A certificate of nomination filed pursuant to this section may upon its face appoint a committee of one or more persons for the purposes specified in section sixty-six of this act." Thus it would appear that to sustain the conclusion of the Secretary of State it is necessary to hold that only nominations made in convention are "originally made" and that those made by committees can never be "originally made." What the convention could do of itself it certainly, unless restrained by positive law, or the rules of its own organization, could do by its own committee appointed for that purpose under well-known and familiar principles of agency, and to hold that because the committee acts instead of the whole convention it is not an original nomination necessarily assumes want of power in the committee itself, however appointed, to make at all an original nomination, a conclusion which under no circumstances should be reached without the clearest indications of legislative will. Certainly the Legislature had knowledge of the not unusual custom of nominating by committee. It was adopted by the two great parties in nominating Chief Judge Andrews in 1892, and circumstances point to its use again in the not distant future. If the construction given by the Secretary of State be right, how would it be possible to nominate by the two great parties by committee a candidate for any State office? Suppose the Republicans next year should nominate a candidate for the Court of Appeals by committee, as it may do, and the Democrats sought to nominate by its committee the same candidate? The Secretary of State, under his construction of the provision in controversy, would have to take the position that the Democratic

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nominating certificate must be refused on the same reasoning that he uses in the case at bar. If he is right, then to effect a nomination of such a candidate by the two great parties a joint meeting of the two committees would be necessary and simultaneous execution of credentials. The law does not contemplate absurdities. The two methods of nomination are considered in my judgment of equal dignity under the Election Law. Either is an original nomination. Either must be certified by a party certificate, in the one case by the officers of the convention, and the other by a majority of the committee. The Legislature says: "It being the intention of this act that when a candidate of one party is nominated and placed on the ticket of another party, or independent body, such nomination must be made at the time and in the manner provided for making original nominations by such party or independent body." The Legislature saw fit to express its own meaning and intention in terms of interpretation, and if it had intended to mean by "original nomination" those made in party conventions or independent body conventions only, language clearly expressive of such meaning would have been used, and it is very plain to be seen that the legislative intent was in this respect not to distinguish between direct convention nominations and those duly made by committee. In its use of the phrase "original nominations," in section 66 of the Election Law, the Legislature clearly meant the first nominations as distinguished from those made to fill vacancies caused by death, resignation, or otherwise after the original, first, or primary nominations. This construction is justified by an examination of the duties of the secondary committee, as shown by section 66. This provides for action by the committee in case of a declination of a nomination, death of a nominee, disqualification of a nominee, or defects in the certificate of nomination of a candidate which may be cured. To fill these vacancies or supply these defects by substitution might well be held as within the legislative mind, as distinguished from "original nominations." The Legislature apparently treated these nominations covered by sections 56 and 57 of the Election Law as "original nominations," and as appears by the heading of section 66 expressly provided for filling vacancies in nominations and correcting certificates, thus showing by separate treatment what was intended as "original nominations," and those made by committee as in the case at bar are within them. It thus appears that to justify the conclusion of the Secretary of State in the premises it is necessary to interpret

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the clause in controversy in section 66 of the Election Law as if it read "when no nominations shall have been originally made by a convention of a political party"; but I conclude that such construction is neither in harmony with sections 56, 57 and 66 of the Election Law, the express declaration of legislative intent in section 66, nor can it be adopted without doing violence to the plain meaning of the language employed under proper canons of interpretation. It follows that the nomination of Mr. Cunneen by the Prohibition party, through its convention committee, was an original nomination, and that the Secretary of State should treat the rejected certificate as a good and valid original nomination of that party of John Cuneen for the office of Attorney-General of the State, and that an order should be entered accordingly.

Ordered accordingly.

SAMUEL GREEN, Plaintiff, v. NATHAN TUCHNER et al., Defendants.

(Supreme Court, New York Special Term, October, 1902.)

Partnership — Continuance of an injunction, to prevent a firm execution creditor from continuing the business, when refused one partner — Receiver.

Where the preponderance of evidence tended to show that the firm of Green & Tuchner was indebted to one Weitzman for money loaned it, that he recovered judgment in another court against the firm without service of the summons upon Green, that when Weitzman attempted to sell on execution Green resisted and obtained leave to defend that action, that Green agreed to the sale provided the proceeds be paid into court to abide the event of that action, and that Weitzman purchased most of the stock at the sale and employed Tuchner, a practical worker in that kind of business, to continue it in Weitzman's name and interest, the Supreme Court refused to allow Green further to restrain Weitzman (and Tuchner) from interfering with or carrying on the business and also refused to appoint a receiver thereof.

MOTION to continue an injunction.

David W. Rockmore, for plaintiff.

J. Leon Brandmarker, for defendant Weitzman.

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HALL, J. The plaintiff seeks to have continued *pendente lite* a preliminary injunction granted in this action to restrain the defendants from interfering with or carrying on a business lately belonging to the firm of Green & Tuchner, composed of the plaintiff and the defendant Tuchner, and he also asks for a receiver of said business. It appears by the papers that plaintiff and defendant Tuchner entered into an agreement of partnership in April last to carry on a brass finishing business. The plaintiff had previously been the owner of the business, and the assets thereof were valued by him at $700. The defendant Tuchner paid him $350 in cash for a half interest in the business and they each became equal partners. The business of manufacturing was carried on down to about August 1st, but very few if any goods were sold, although the expenses of the business went on, and the partners drew ten dollars per week each out of the assets for living expenses. Some disagreement arose between the partners early in August, and they agreed to dissolve. On August 8, 1902, while plaintiff was at the place of business the sheriff of this county appeared and took possession of the stock and assets by virtue of an execution issued out of the City Court of the city of New York upon a judgment rendered in that court in an action in which Ch. Weitzman, one of the defendants herein, was plaintiff, and Nathan Tuchner (also a defendant herein) and the plaintiff herein were defendants. The property was advertised for sale by the sheriff, but the sale was stayed by one of the justices of the City Court of the city of New York by a stay contained in an order to show cause, obtained by the plaintiff herein, why the judgment should not be set aside and the defendant Green allowed to come in and defend. Pending a decision of said motion an agreement was made between the attorneys for Weitzman, the plaintiff in that action, and the plaintiff Green, one of the defendants in that action, by which the stay was vacated and the sale allowed to proceed, the proceeds thereof to be held by the sheriff pending a trial of said action in the City Court, the defendant (in that action) Green having been allowed to defend the same. An answer has been served by Green in the City Court action, and the same is now at issue and on the calendar for trial. At the execution sale Weitzman, one of the defendants herein, became the purchaser of most of the property, although some of it was purchased by outside parties. The plaintiff Green attended the sale and bid upon some of the property, but was out-

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bid by other purchasers. The plaintiff claims that the action in the City Court of the city of New York was commenced and judgment entered and execution issued pursuant to a conspiracy between Tuchner, his partner, and the defendant Weitzman, by which Tuchner was to obtain possession of the business and oust the plaintiff by using Weitzman as a cloak, and that the business has since been carried on by Tuchner, and that Weitzman has had no part in it. It is also claimed that the alleged debt of the firm to Weitzman, upon which the judgment was obtained, was fictitious and had no existence in fact, and that the firm was not indebted to Weitzman for borrowed money or upon any account whatsoever. If these facts were undisputed the plaintiff would certainly be entitled to the relief here prayed for, but the defendants' papers disclose a state of facts which are practically undenied, and which put a very different aspect upon the matter. It is shown, and not disputed, that although the manufacturing part of the business was carried on actively from April to August, few if any goods were sold. The expenses were paid, consisting of rent, wages, drawings by the partners, gas, materials, etc., and they all appear to have been met in some way. Weitzman swears, and it is not denied, that a part of his loans were made directly to the plaintiff Green, and that some of the advances were made to Tuchner in Green's presence and were made upon the statement that the money was absolutely necessary in the business. Green, the plaintiff, after learning of the judgment and execution, went to the office of Weitzman's attorney and agreed upon terms of settlement of the same and paid thirty-five dollars on account of the judgment, and made no claim that it was not a valid judgment, notwithstanding the fact that he had not been served with process. Green's attorney entered into a stipulation in the City Court action vacating the stay, and allowing the copartnership assets to be sold under the execution issued upon the judgment which he now claims was the result of a conspiracy, and he attended the sale and bid upon some of the property. I think the preponderance of evidence shows that the business has, since the sale, been owned and carried on by Weitzman, although he may have employed Tuchner, who was a practical worker, whereas Weitzman was not. The plaintiff is perhaps entitled to a dissolution of the copartnership and an accounting of the assets, if any, and if he can convince the court of the facts set forth in his complaint he may receive his share of

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the proceeds of sale of the assets now in the hands of the sheriff, but he fails entirely to make out a case entitling him to an injunction *pendente lite,* and no present necessity exists for the appointment of a receiver. Motion to continue injunction denied, with ten dollars costs, and temporary injunction contained in order to show cause dissolved, and the motion for receiver is denied, with leave to renew if necessary.

Ordered accordingly.

JOHN B. B. FISKE, Plaintiff, *v.* MARINA ELENA PARKE, formerly MARINA ELENA DELGADO, Defendant.

(Supreme Court, New York Special Term, October, 1902.)

Attachment — Levy upon a bond, secured by a mortgage, where insufficient to support a judgment, for money only, otherwise invalid.

An attachment cannot be deemed to have been legally levied so as to save a judgment, for a sum of money only, recovered against the defendant without personal service of the summons upon her within the State of New York, where the proof of levy is that the sheriff, instead of taking into his custody a bond and mortgage due her (but not shown to have been within this State at the time of the levy) as he was required to do by law, merely accepted a certificate of the mortgagor that he was indebted to her upon the bond and mortgage in a sum named in the certificate.

For such a purpose such a debt does not exist apart from the securities which represent it.

MOTION to vacate and set aside a judgment.

D. F. Toumey, for plaintiff.

Moses & Morris, for defendant.

HALL, J. The defendant moves to vacate a judgment rendered against her in an action for the recovery of a sum of money, on the ground that no personal service of the summons has been made upon her in this State, and that no valid levy has been made upon any property belonging to her in this State under the warrant of

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attachment issued in this action. The pretended levy upon accruing income of a trust estate, in which income defendant had an interest, was clearly insufficient to sustain the judgment, the trustee of the estate upon whom the warrant was served having certified that there was no income of the trust estate in his hands at the time of such service to which defendant was entitled. The main contention of plaintiff in support of the judgment is that a valid levy was made under the warrant by the sheriff of Kings county, upon a debt owing to plaintiff by one W. A. A. Brown, and, upon the sufficiency of this levy, the validity of the judgment depends. It appears that a copy of the warrant was served upon Brown, and he certified that he was indebted to the defendant in the sum of $7,000, secured by a bond and a mortgage upon real estate in Kings county. The sheriff did not take actual possession of the bond and mortgage, nor does it appear from his return whether such bond and mortgage were in this State or not. The plaintiff contends that the levy was upon the debt, and that the debt existed aside from the security, and also that the section of the Code referring to levies upon bonds was intended to refer to such as were negotiable by delivery, such as railroad bonds, etc., and not to bonds secured by mortgages upon real estate. The levy upon the debt could not avail the plaintiff. The sheriff could not collect the debt unless he had the securities. As to the latter contention of plaintiff, it is only necessary to say that the Court of Appeals has settled the law upon that question many years since, and in a case involving precisely the same questions here presented. Anthony v. Wood, 96 N. Y. 180. That was a case where the sheriff attempted to levy upon a note secured by a bond and mortgage by simply serving the warrant upon the debtor and demanding the securities, and he afterward obtained possession of the securities, but after the first pretended levy had been made, and before he obtained possession of the securities, they had been assigned by the debtor. The court held that the first levy was ineffectual and that the subsequent assignment was valid. The court says (at p. 187): "It (the levy) must be 'by taking the same into the sheriff's actual custody,' who must, thereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant and of the affidavits upon which it was granted.' No other mode is prescribed. Nothing else will constitute the levy. Until the officer has obtained the actual custody,

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he has made no levy and can make none. He is armed with power to get such custody. He may proceed by action or special proceeding to reach that result, but, until he has reached it, he has made no levy and can make none. We have nothing to do with the wisdom of the rule. We can only enforce it as it is plainly written. It follows that neither before or after the assignment did the sheriff acquire any title to or lien upon the note or bond and mortgage." The doctrine laid down in that case has never been modified or criticised by the court, but has been approved in cases since decided. Plaintiff's counsel cites a number of cases which hold that where securities of the debtor have been pledged, service of the warrant upon the pledgee without taking actual possession of the securities has been held a good levy, and seeks to draw a parallel between such cases and the one now before the court, but the distinction is clear. In the case of pledged securities, the pledgee is entitled to possession of the securities until the amount of the pledge is repaid, and the levy is not then made upon the securities but upon the interest or equity of the pledgor therein. It follows that the order for judgment and the judgment in favor of plaintiff must be vacated and set aside, with ten dollars costs.

Judgment vacated and set aside, with ten dollars costs.

ELIZABETH W. STEVENS, Plaintiff, *v.* WALTER J. SALOMON, Defendant.

(Supreme Court, New York Special Term, October, 1902.)

Lease — Right of tenant to easements of light and air in the rear yard of her landlord — Mandatory injunction — Tenant's right thereto saved by her timely objections and notice to landlord that she intends to sue him.

A person in occupation of second-story premises whose rear abuts upon a yard is entitled to an easement of light and air therein, and, where, after and while the relation of landlord and tenant has arisen and is existing between the parties, the landlord builds in the yard a three-story extension of the premises, having the effect of cutting off light and air from the rear windows of the demise of the tenant,

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he will at her suit be directed by a mandatory injunction to remove so much of the extension as is higher than her windows.

Where she has promptly objected to his acts and notified him of her intention to sue him, the fact that he succeeded in completing the extension before an injunction order in the action was served upon him cannot avail him.

ACTION by tenant against landlord for a mandatory injunction.

Blackwell Brothers, for plaintiff.

John P. Everett, for defendant.

STECKLER, J. For several years prior to October 1, 1901, the plaintiff, as tenant, had occupied the second floor of the premises 19 West Forty-second street. There were three windows in the rear of said premises, and the yard upon which the windows opened was thirty feet in depth. In the preceding August the landlord sold the property to the defendant, and the latter accepted from plaintiff the rent for September and October, and on October 10, by a writing, leased her the same premises for three years and six months from November 1 following.

Prior to the making of the lease the defendant made alterations in the front of the building, and during the work plaintiff's possession was interfered with and impaired. About October 10 the alterations were completed, and by the terms of the lease plaintiff waived "any claim she may have against the party of the first part (defendant) for damages sustained by reason of the repairs and alterations done to and about the premises." That provision clearly refers to repairs and alterations prior to the date of the lease.

When the lease was made there was no structure in the yard interfering with the light and air coming into plaintiff's rear room. After the date of the contract the walls of a three-story extension were erected in the yard above the level of plaintiff's windows, cutting off light and air; and the action is for an injunction restraining the construction of the extension, and directing defendant to take down the structure.

Although it does not appear that the plaintiff had a right of

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access to the yard, the light passing into the windows from the yard was essential to the beneficial use of the premises. The evidence establishes that at the time the lease was made it was the intention of the parties that plaintiff should have such use of the premises. To the extent of the light and air coming from the yard into the rear room the plaintiff was therefore entitled to an easement in the yard, and an attempt to change the condition of affairs to her detriment may be defeated by an injunction (Doyle v. Lord, 64 N. Y., 432; Brande v. Grace, 154 Mass., 210; Salisbury v. Andrews, 128 id., 336).

That defendant's acts were done before the beginning of the term fixed by the written lease is not of vital importance. The obstruction was raised above the level of plaintiff's windows while the plaintiff was defendant's tenant. She had paid him rent for September and October, and was entitled to possession for the balance of the month of October as well as for the term of three years and six months from November 1. So that in fact at the time of the acts complained of she was a tenant having a term of three years, six months and several days in the demised premises; and her right to the easements was as strong in October as it would be after the beginning of the term fixed by the written lease.

Neither is it material that the defendant succeeded in completing the structure before service of the injunction order was made upon him. The plaintiff had promptly objected to his acts, and notified him of her purpose to bring the action (Daniel v. Ferguson, L. R., 1891, 2 Ch., 27).

If follows that the plaintiff is entitled to a mandatory injunction directing defendant to remove that part of the extension above the level of plaintiff's rear windows, with costs.

Judgment accordingly.

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THE PEOPLE ex rel. DAVID C. LAWYER, as Supervisor of the Town of Cobleskill, Relator, *v.* THE BOARD OF SUPERVISORS OF SCHOHARIE COUNTY, Defendant.

(Supreme Court, Schoharie Trial Term, October, 1902.)

Tax Law — Distribution by supervisors of the tax on bank stock created by L. 1901, ch. 550, § 2 — Mandamus to cure mistakes in acts purely ministerial.

A county is not a "tax district" within the meaning of the Tax Law (L. 1896, ch. 908, § 24, as amd. L. 1901, ch. 550, § 2) and therefore is not entitled to share in the distribution of the tax laid by said statute of 1901 on bank stock taxable in the tax district.

A board of supervisors, in distributing the said tax as directed by the said statute of 1901, acts ministerially and not judicially, and therefore where the board makes a mathematical error in distribution a peremptory mandamus will issue to it to correct the error.

TRIAL, under a return to an alternative writ of mandamus, of the question whether the defendant has made a lawful distribution of the amount of tax received upon bank stocks assessed in the town of Cobleskill for the year 1901.

Watson Lamont (George M. Palmer, of counsel), for relator.

Dow Beekman (Albert C. Tennant, of counsel), for defendant.

CHESTER, J. In the village and town of Cobleskill are two banks. In the year 1901 the assessors of that town made their assessment against each stockholder of such banks in the manner required by law. The aggregate assessed value of such shares of stock of said banks respectively was as follows:

The First National Bank of Cobleskill.....	$193,235 08
The Farmers and Merchants' Bank of Cobleskill..	65,431 29

Under the provisions of the Tax Law (Laws 1896, chap. 908, art. II, § 24, as amended by Laws 1901, chap. 550, § 2) this assessment of bank shares was subject to a tax at the rate of 1 per

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centum upon such value. This tax was paid by these banks, respectively, to the treasurer of Schoharie county as follows:

The First National Bank	$1,932 35
Farmers and Merchants' Bank	654 31
Total tax paid	$2,586 66

No question is made as to the regularity or amount of the assessment, but it is claimed by the relator that an erroneous principle was adopted by the board of supervisors in distributing or apportioning this tax among the tax districts entitled thereto.

The board apportioned the tax as follows:

To the county of Schoharie	$568 88
To the village of Cobleskill	1,385 54
To the town of Cobleskill	632 24
	$2,586 66

The village and town of Cobleskill refused to receive any part of the sum so apportioned to them, respectively, when the county treasurer offered to pay it to them, on the ground that they were entitled to have the whole of the tax refunded and that the county was not entitled to any of it.

The Tax Law, as amended in 1901, section 24, after providing for the method of the assessment and collection of tax on bank shares, contains the following clause: "The tax hereby imposed shall be distributed in the following manner: The board of supervisors of the several counties shall ascertain the tax rate of each of the several town, city, village, school and other tax districts in their counties, respectively, in which the shares of stock of banks and banking associations shall be taxable, which tax rates shall include the proportion of state and county taxes levied in such districts, respectively, for the year for which the tax is imposed, and the proportion of the tax on bank stock to which each of said districts shall be respectively entitled shall be ascertained by taking such proportion of the tax upon the shares of stock of banks and banking associations, taxable in such districts respectively, under

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the provisions of this act as the tax rate of such tax district shall bear to the aggregate tax rates of all the tax districts in which said shares of stock shall be taxable."

The provisions above quoted require the tax to be distributed among the tax districts in which the bank shares are taxable. To justify the distribution of a portion of the tax to the county required the board to regard the county as a tax district. This it appears they did, but in so doing I think they fell into an error. The Tax Law (§ 2) defines a "tax district" to be "a political subdivision of the state having a board of assessors authorized to assess property therein for state and county taxes." While a county, like towns and villages, is a political subdivision of the State, it has no board of assessors as do towns and villages and, therefore, it does not come within this statutory definition of a tax district. It was, therefore, unlawful for the board to include the county in its apportionment of this tax and the whole of it should have been apportioned to the town and the village of Cobleskill which were the only "tax districts" within which the bank shares, upon which this tax was paid, were taxable.

It appears that the board ascertained that the tax rate for 1901 of the town of Cobleskill was .0047, and of the village of Cobleskill .0103, making the aggregate tax rates of both tax districts .0150.

Under section 24 of the Tax Law the amount of the bank tax to which each of said tax districts is respectively entitled is such proportion thereof as the tax rate of such tax district shall bear to the aggregate tax rates of all the tax districts in which the shares of stock shall be taxable.

Following this provision of law, it was the duty of the board to apportion the tax on these bank shares, amounting to the sum of $2,586.66, to the town and village of Cobleskill, being the only two districts where the shares were taxable, and the town is entitled to $827.12, or .0047/.0150 thereof, and the village to $1,759.54, or .0103/.0150 thereof.

In ascertaining the tax rate for the payment of county and State taxes it appears that the board did not include in the aggregate equalized valuation of the real estate and the other personal assessments any of the bank stock assessments in the county, which amounted in all to $386,562.93, and by this process made the

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aggregate of real and personal assessments the sum of $12,024,087. The total of State and county taxes being $50,854.52, the tax rate was ascertained to be .004229. If the bank stock assessments had not been eliminated from the total valuations a computation shows that the tax rate would have been reduced to .0040976.

Much attention was given on the argument and briefs of counsel to the question as to which of these methods of ascertaining the rate was correct under the law, counsel for the relator urging that the assessments on bank stocks should be included and for the defendant that they should be excluded.

I do not think, however, that the decision of this question is essential to the determination of the case. Even if an error has been committed by the board in this respect, it cannot be corrected in this proceeding, as it affects all the tax districts of the county, and they are not here as parties.

It is also urged on behalf of the board that in making the apportionment of the bank tax among the districts entitled thereto they were required to exercise judgment and discretion, and having acted, even though erroneously, their acts are not subject to the writ of mandamus. While the law required the board to ascertain the tax rate of the districts entitled to participate in the distribution of the tax, that duty was purely ministerial and not judicial. The rate for the town of Cobleskill, .0047, was known by the board, for they had previously fixed it in levying the taxes against the town. The rate for the village of Cobleskill, .0103, had been officially reported to the board by the treasurer of the village. These rates were existing facts which the board had to ascertain. To do so required the exercise of no discretion. When ascertained they had the simple duty, under the law, of adding the rates together and giving to the village tax district and to the town tax district so much of the tax as the tax rate of each district bore to the aggregate tax rates of both tax districts. This again involved the exercise of no discretion or judgment, but simply a mathematical calculation in which accuracy only was requisite.

To correct the error of law which the board fell into in regarding the county as a tax district, and apportioning a part of the fund to it, I think the relator is entitled to the peremptory writ of mandamus prayed for, but as the board acted under legal advice, and evidently in good faith, the writ should issue without costs.

Ordered accordingly.

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Matter of the Application of KATE M. MURPHY for a Writ of Mandamus against WILLIAM H. MAXWELL, as City Superintendent of Schools of the City of New York.

(Supreme Court, Kings Special Term, November, 1902.)

New York city — Female public school teacher entitled to the issue of a certificate of her salary (necessary to payment) despite her marriage.

The city superintendent of schools of the city of New York cannot lawfully refuse to certify to the auditor of the board — an act necessary to payment — the salary of a woman, permanently appointed in 1891 a teacher in a public school in Brooklyn and who, while still in service, married on Jan. 21, 1902, upon the ground that the by-laws of the school board of Kings in force on Jan. 21, 1902, provided among other things: "Should a female principal, head of department or teacher marry, her place shall thereupon become vacant", and this because the by-laws of a school board of the city of New York are precluded by its charter of 1897 from conflicting therewith, the charter provisions contemplate the removal of teachers only upon charges preferred and after a trial, and the by-law cannot of itself, without affirmative action upon the part of the board, create a vacancy.

APPLICATION for peremptory writ of mandamus.

Swanstrom & Keyes (Conrad Saxe Keyes, of counsel), for petitioner.

George L. Rives, Corporation Counsel (Walter S. Brewster, of counsel), opposed.

COCHRANE, J. The undisputed facts show that in February, 1891, the petitioner was appointed a teacher in public school No. 30, of what was then the city of Brooklyn, under a permanent appointment; that she held a certificate known as a Grade A certificate, which entitled her to a permanent appointment as teacher of any grammar grade within said city; that she continued to perform her duties as such teacher in said school until on or about

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the 21st day of January, 1902, when she was married, and that since the 1st day of February, 1902, she has actually been present and has performed the duties of her position as teacher, and no other appointment has been made to her position in public school No. 30.

It is the duty of the superintendent of schools, under section 36 of the by-laws of the board of education, to transmit to the auditor a certificate setting forth among other things, the salary schedule under which the teachers shall be paid, and to certify the changes of name of any teachers who marry, and without such certificate the salaries of the various teachers cannot be paid. The said superintendent has withheld such certificate in the case of the petitioner and she is, therefore, unable to draw her salary for work performed by her since the 1st of February, 1902.

Section 302 of the by-laws of the school board of the borough of Brooklyn, in force at the time of the marriage of the petitioner, provided in part as follows: "Should a female principal, head of department or teacher marry, her place shall thereupon become vacant, but her marriage shall not operate as a bar to her reappointment, should it be deemed to the interests of the school to retain her services." It is in reliance on this by-law that the superintendent refuses the certificate in question, which is necessary to enable the petitioner to receive her salary.

By section 1090 of the city charter, applicable to this case, in January, 1901, it was provided that the by-laws adopted by the school board should not conflict with the provisions of the charter.

Section 1117 of the charter, in force prior to the amendment which became effective during the present year, provided in part as follows: "All superintendents, assistant or associate superintendents, and all principals, teachers, and other members of the educational staff in the public school system of any part of the city of New York, as constituted by this act shall continue to hold their respective positions and to be entitled to such compensation as is now provided, or may hereafter be provided by the various school boards, subject to the limitations of this act, and to re-assignment or to removal for cause, as may be provided by law." Section 1114 of the same charter provided that charges might be preferred against a teacher "for gross misconduct, insubordination, neglect of duty, or general inefficiency," and provision was then made for a trial of such charges, and the manner of conducting the trial.

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These several legislative enactments are continued in the charter as at present amended. It is evident that the Legislature intended that teachers should not be removed from their positions except after a trial upon charges preferred against them.

It is doubtless proper to establish reasonable rules and by-laws, subject to which teachers should hold their positions, and for the purposes of this proceeding it may be assumed that a by-law against the marriage of a female teacher, while she is a member of the educational staff, is reasonable. But the difficulty with the by-law in question is that it declares a vacancy to exist as the result of the marriage of a female teacher *ipso facto,* or, in other words, it seeks to accomplish her removal without the preferment of charges, and to this extent it is obnoxious to the statute and inoperative. The statute casts the burden of affirmative action on the board of education. It is entirely competent for the board to waive the provisions of a by-law, such as the one in question, and unless the removal of the petitioner was brought about in the manner provided by statute, viz., by preferring charges for violating the provisions of the by-law, her connection with the educational staff of the city remained unaffected. It was not necessary, therefore, for the petitioner to seek reappointment, for the reason that the by-law in question could not, in and of itself, have the effect of declaring a vacancy, and the board of education has not taken the affirmative steps to effect her removal which the statute requires.

The case of People ex rel. Fahy v. York, 49 App. Div. 173, cited in opposition to this application, is not in point. It was held in that case that absence for five days by a patrolman on the police force operated to create a vacancy, but that decision rested upon express enactment of law, and not on a rule of the department. Nor can it be successfully contended in this case that because the employment of teachers is contractual, the by-law in question was a part of the essence of the contract. The petitioner held a permanent position before the enactment of the charter, and when the latter went into effect it contained a provision (§ 1117, *supra*) that teachers "should continue to hold their respective positions, subject to the limitations of this act, and to re-assignment or to removal for cause, as may be provided by law." Moreover, to hold that an unauthorized by-law was an essential part of the contract of a teacher, would be in effect to hold that all of the provisions of

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the charter might be nullified by the creation of a by-law, no matter how inconsistent with the charter the same might be.

The city superintendent should make the necessary certificate to enable the petitioner to receive her salary since February 1, 1902, and a peremptory writ of mandamus may issue accordingly.

Ordered accordingly.

THE NEW YORK PUBLIC LIBRARY, ASTOR, LENOX, AND TILDEN FOUNDATIONS, Plaintiffs, *v.* GEORGE H. TILDEN, SAMUEL J. TILDEN et al., Defendants.

JOHN BIGELOW, ANDREW H. GREEN, and GEORGE W. SMITH, as Executors of, and Trustees under, the Last Will and Testament of SAMUEL J. TILDEN, Deceased, Plaintiffs, *v.* GEORGE H. TILDEN, SAMUEL J. TILDEN et al., Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Equity — Marshaling assets — Merger — Trustees when protected in payments made under a trust void because for the benefit of the donor — Subrogation — Estoppel — Academic question not discussed.

Where a debtor expressly agrees that a particular creditor shall have a lien upon two funds, composed respectively of real and personal property, the equitable rule that a doubly secured creditor must be paid first from the fund upon which singly secured creditors have no lien does not apply and payment should be made the doubly secured creditor one-half from each fund; and particularly where other claims against the personalty — the fund upon which the singly secured creditors have no lien — would exhaust that fund.

Merger is a question of intention and none will be presumed or declared where the parties intended none.

To effect a merger the estates must unite in the same legal person and he must hold them in the same right.

A deed or assignment, by which a failing debtor conveys all his property to trustees upon their simultaneous but separate agreement to convey back to him in fee upon request and in the meantime use the income and the proceeds of any sales to support him and his family and pay his debts, is void; but where the trustees subse-

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quently raise money on their own notes and, in reliance upon the assignment, pay a percentage of his just debts, they are entitled to reimbursement therefor in preference to subsequent liens or claims and will be subrogated *pro tanto* to the rights, in funds representing his estate, of the creditors whose debts they paid.

A creditor who, after accepting and retaining a dividend under such an assignment with knowledge of all the circumstances attending it and releasing the trustees, secretly procures from the assignor his notes, and security for the balance of the claim, cannot enforce a judgment, which he entered thereon upon confession, against funds representing the assignor's estate.

Where a fund has been exhausted by the terms of a decision of the court in regard to its disposition, the court will not discuss the rights as between each other of other claimants to the fund — and this because the questions have become academic.

MOTION to confirm referee's report.

Carter and Ledyard, for plaintiffs in both actions.

Countryman, DuBois and Bevans (Pierre E. DuBois, of counsel), for George H. Tilden, Samuel J. Tilden, William A. Whittlesey, Edward T. Slocum.

William B. McNiece (Louis S. Phillips, of counsel), for Adelaide E. T. Buchanan.

E. D. DeLamater, for The National Hudson River Bank.

Cadman & Peck, for Clark and another, claimants.

Alexander & Green (William L. Kitchel, of counsel), for The Mercantile Safe Deposit Company.

Frank Cochrane, for Paine and another, claimants.

Barent W. Stryker, in person.

P. D. Bell, for National Mahaiwe Bank of Great Barrington.

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FITZGERALD, J. As now presented to the court, this is a motion for the confirmation of the report of a referee, ascertaining and stating the unsatisfied liens and claims upon the undivided shares of the defendant George H. Tilden both in the proceeds of the real property sold in the first above-entitled action of partition and of the personal property affected by the second above-entitled action for the construction of the will by which those funds of personal property were created and for an accounting therefor. The report further, in accordance with the directions of the order of reference, declares the rights, priorities, and equities of the owners of said unsatisfied liens and claims, as between themselves, and as against the above-named defendants, and determines the validity of the various claims and assignments existing against the interests of all of said defendants and the rights, priorities, and equities created by and arising under said claims and assignments. There remained on deposit in this court, subject to its further order in the proceeding in which the said report was made, the sum of $26,175.05, as the amount of the share of the defendant George H. Tilden, of the proceeds of the sale of said real property, and the further sum of $11,563.77 as his share of the said funds of personal property. Against the former many liens evidenced by judgments, much greater than the amount of said share, were asserted; against the latter, also, many claims by way of assignment and otherwise, much greater than the amount of said share, were sought to be enforced. The rights and equities arising from and the priorities of said liens and claims were considered and found by the referee, and an application of the said shares to the payment thereof was made by him accordingly. To these reported findings and application many detailed exceptions were filed by different claimants, which created the issues now presented to the court for determination and which will hereinafter be briefly treated.

The first question presented by the report and the exceptions thereto is that of the correctness, in law, of the apportionment by the referee of the payment of the undisputed and admittedly prior claim of the Tilden trust for $13,540 equally by and between and against the said shares of said realty and personalty, one-half of said claim being chargeable against and payable from and out of each share. The said claim being secured both by mortgage upon the interest of said defendant in the said realty, and by an assignment of his interest in the said personalty and the claimant, there-

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fore, having recourse to the two shares for the payment of its claim, it is contended by those claimants holding liens only against the said defendant's share of the proceeds of the realty, that this apportionment by the referee is unjust and erroneous, and that, under the equitable doctrine of the marshaling of assets, the said claimant should have been compelled, in obtaining payment of its claim, to resort first to the defendant's share of the said personalty. It is evident, however, that upon this point the referee's findings are correct for the following reasons: The admittedly correct and prior claim of the said claimant arose from its loan to the said defendant of the sum of $10,000, evidenced by the bond of the latter. As collateral security for the payment of said bond the said defendant simultaneously executed and delivered to said claimant a mortgage upon his interest in all of the realty involved in the first above-entitled action and an assignment of his interest in all the personalty of the testator, a portion of whose will was construed in the second above-entitled action. While neither the defendant nor his wife testified upon this point, yet the terms of the instruments in question and the physical fact of simultaneous execution and delivery thereof indicate that it was the intention of the parties thereto that the defendant's indebtedness to the said claimant should be secured equally by his share in the said realty and by his share in the said personalty, and that the claimant should have the right to insist upon payment from either or both of said funds. That such was the intention of the claimant, at least, is distinctly testified to by its attorney; and, consistent therewith, a lien was claimed by said claimant, throughout all the proceedings herein, as against either or both of said shares, although each was more than sufficient to pay and satisfy the full amount of said claim and interest. The debt, so far as it is possible to judge from the words and acts of the parties, being intended to be equally secured by the said shares, it is proper that, in the distribution of the latter, it should be chargeable against and payable from them equally unless equity should require otherwise. In considering the existence of such a requirement here, it is conceded that the equitable doctrine of the marshaling of assets invoked by the creditors having a lien only upon one of the said shares of the defendant, would be applied as against the prior and doubly secured claimant, if there were no other claims against the defendant's share of the personalty to which the singly secured

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claimant insists that the doubly secured creditors should first resort. But there were other such claims against the said share of the personalty. The referee finds there were three, those of Whittlesey and Slocum, as trustees, National Hudson River Bank, and Stryker, the two former of which he allows. While these claims existed and were enforceable against the share of the personalty, to compel a creditor secured by both shares, at the instance of a claimant having a lien only against the share of the realty, to resort first and entirely to the share of the personalty, would, in effect, be preferring one class of claimants at the expense of the other, for which purpose the rule will not be applied. 14 Am. & Eng. Encyc. of Law, p. 685. Both shares having been deposited in court, they will be distributed according to equity; the rights, equities and priorities of all of the claimants as between themselves as against both funds were submitted to and had to be considered by the referee; and he has correctly held that equity does not require or permit the application of the fund of the owners of claims against the share of the personalty to the payment of a prior debt which is a lien against both shares in order that the lien of a claimant against the share of the realty may be thereby the more fully satisfied. To overcome the effect of this equitable rule, the claimant Mrs. Buchanan, having a lien against the realty, contends that the claimant Stryker and the National Bank of Hudson cannot be heard to complain of the marshaling of the assets for her benefit, first because their mortgages covering both shares, being taken subsequent to her lien, they took their securities with constructive notice of the prior liens on both funds and of the equities, including that sought to be herein enforced, of prior lienors, and secondly because they gave no valuable consideration for their securities. This contention, it will be noticed, overlooks the claim of Whittlesey and Slocum, as trustees, which, as allowed by the referee, is alone sufficient to consume the share of the personalty. The lien of Stryker, as hereinafter more fully stated, was properly disallowed, and with respect to the said contention of the claimant Buchanan, need not be considered here. So far as the defendant's share of the proceeds of the sale of the realty in Kings county is concerned, it is evident that the bank's lien, by reason of its assignment and mortgage on May 17, 1898, is prior and not subsequent to that acquired by the claimant Buchanan by the docket of her judgment against the defendant

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in that county on February 1, 1899; and the record shows that the bank did advance an additional $1,000 on the security of the mortgage delivered to it by the defendant. For these reasons the exceptions to that portion of the report of the referee apportioning the claim of the Tilden trust equally to the shares of the realty and personalty and directing its payment equally therefrom should be overruled and the findings of the report thereon confirmed.

The exception most vigorously urged to the findings of the report establishing the validity and declaring the priority and equity of the lien of Slocum as the trustee of the sisters of said defendant against the proceeds of his share of the real estate, arising under the assignment to said trustee of a judgment recovered by Samuel J. Tilden against said defendant, and entered and docketed May 18, 1895, because this lien is admittedly prior in time to all others and because its allowance by the referee entirely exhausts the said share of the proceeds of the sale of the realty now on deposit. The original judgment was recovered prior to the acquisition of the liens of the contesting creditors after a sharply-contested litigation and, with the costs and interest, amounted to forty thousand six hundred and fifty-one dollars and seventy-five cents ($40,651.75); and it was duly docketed in the counties in which the real property was situated, the proceeds of which formed one of the funds in this action. Neither this judgment nor the lien thereof, as it existed June 7, 1897, for the amount actually due thereon, was attacked before the referee. Many years before the entry of this judgment, before the accrual of the claim upon which it is founded, and before the acquisition of any claim by any other creditor, the judgment creditor had entered into an agreement with his sisters for the manufacture and sale of certain medicinal preparations of which they were the owners; and for the enforcement of their rights and the collection of their royalties thereunder, the sisters then appointed one Slocum as their agent and trustee. Immediately previous to or about the time of the assignment of the judgment in question and of the adjustment of the rights of the said defendants and their sisters, there was owing to the latter from the said judgment creditor for accrued and unpaid royalties the sum of ten thousand five hundred and forty-two dollars and ninety-five cents ($10,542.95); the royalties for the balance of the term of the agreement, estimated on the basis of those already accrued, and discounted as of June 9, 1897, were valued by the parties at

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twenty-six thousand seven hundred and nineteen dollars and fifty cents ($26,719.50), making the value of the contract to the said sisters on the last-named date the sum of thirty-seven thousand two hundred and sixty-two dollars and forty-five cents ($37,262.45), without reference to the value of the option for an extension of the period of the agreement, which was subsequently computed to be worth eighteen thousand one hundred and thirty-five dollars ($18,135). After the entry of Samuel's judgment the claimant Buchanan also recovered a judgment against George H. Tilden, which was docketed in New York and subsequently in Westchester and Kings counties. The said defendant and judgment debtor being unable to overcome his financial difficulties, as indicated by the said judgments and other judgments and levies against him, executed a trust deed or assignment of all his real and personal property, including all his right, title and interest in and to the estate of the testator herein to two trustees, one of whom was the said Slocum; this deed was treated and insisted upon by the said debtor and his trustees as a valid conveyance between the parties thereto. After the entry of Samuel's judgment against George H. the latter had acquired, by assignment from his father-in-law, a judgment against Samuel, which was then standing as security only. It being the desire of Samuel and of the sisters to secure a payment, satisfaction and release of the claims of the latter against the former under the agreement for royalties, and it being the wish and hope of all the relatives, the agent for the sisters and the trustees of the said defendant to overcome the financial conditions of the latter, a basis of settlement was determined upon, a computation of their respective rights was made by the representatives of the parties and agreements embodying their conclusions were executed. By these agreements, in accordance with the settlement on which they were founded and to which they referred, Samuel agreed to assign to the said Slocum, trustee for the sisters, his judgment against George and his interest in one medicinal preparation and trademark; he acquired in return the continued right to manufacture the other preparations, received a release and discharge from all his indebtedness and liabilities due and to become due under the original agreements, and was granted the option of the sole and exclusive right to manufacture and sell the said preparations for a renewed period at a reduced rate. Against the amount of Samuel's judgment against George was

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offset the amount of the latter's judgment against the former with the result that a balance was found to be due on the judgment of Samuel of twenty-four thousand eight hundred and eighty-five dollars and sixty-nine cents ($24,885.69). Samuel, in accordance with these agreements, assigned his judgment against George to said Slocum, and the latter, a few days after, made and acknowledged a declaration of trust reciting the agreement of settlement, the assignment of the judgment and trademark, declaring that the said assignments were made to him in trust for the sisters and their legal representatives "from motives of convenience," stating that the consideration for said assignments was the release and discharge of Samuel's liability under the original agreement for royalties, referring to the offset of the judgment held by George against Samuel, with the result that the above-stated balance was found due on the latter judgment, admitting that he holds the said judgment and trademark as trustee for the sisters, promising that he will use all means to collect the amount thereof, and will pay the net value of the same to the parties entitled thereto. It is under this said assignment of the judgment that the said claimant, Slocum, as trustee, made the claim against the share of the defendant George H. Tilden in the realty, which has been allowed by the referee. The allowance of the said claim is now contested on the ground that the assignment of the judgment, and the agreements in accordance with which it was made, were collusive and fraudulent against subsequent claimants, and were intended to hinder, delay and defraud creditors; that at the time of the assignment the sum of twenty-four thousand eight hundred and eighty-five dollars and sixty-nine cents ($24,885.69) was not due on said judgment; that by said assignment the lien of said judgment was lost as against the said defendant's realty, was both in fact and in law merged in the real estate which had been previously conveyed by the said defendant to his trustees and was thereby, with the lien thereof, in fact, in law and in equity paid, satisfied and discharged. It was evidently the contention of the lienors, subsequent in time to the original judgment, that the purpose of its assignment was not only to obtain the discharge of the large claim against the defendant, George H. Tilden, but to offer it as collateral security for the amount of a loan of money to settle with his creditors; that it was acquired solely and exclusively for the benefit of said debtor and that it was asserted as a lien only when

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Mrs. Buchanan's lien was finally sustained by the courts. This contention finds some support in the social and legal relations between the parties, in the fact that some of the instruments were not recorded or otherwise published at the time of their execution, and in fragments of the testimony of the trustee, Whittlesey, "that the judgment was valuable to secure money with which to settle with George's creditors," that he told the sisters "that the judgment would be held by Judge Slocum as security for their indorsement," and of the testimony of Samuel J. Tilden that they told him they wanted the judgment to use it as collateral to raise some money to take care of his brother's indebtedness, or to raise some money to straighten out his affairs. Notwithstanding these facts and the inferences to be derived therefrom, it is difficult to see what other conclusion could have been arrived at by the referee; certainly the question of fact having been submitted to him and his findings having been made thereon, it is evident, after a perusal of the testimony and exhibits, that the said findings are not contrary to or against the weight of evidence, and that they should not be overruled. It is true, as frankly stated by Judge Slocum, and as is indicated by all the negotiations and the instruments through which their conclusions were finally expressed, that one of the purposes of the many transactions between the parties was the favorable settlement of the complicated financial affairs of the debtor and defendant, George H. Tilden; but that was only a purpose incidental to the general settlement of all of the affairs of the family and relatives which were much complicated and, in some cases, litigated at the time. The evidence does not warrant a decision by this court contrary to the findings of the referee, that there was any collusion between the parties to the said transactions and agreements. It is obvious that throughout all of their negotiations their interests were opposite and each was mindful and insistent upon the protection and enforcement of the same; the nature and extent of their mutual rights and liabilities were carefully ascertained, deliberately computed and strictly enforced. Whatever the hopes and wishes of the sisters with respect to the use of their judgment, when acquired, in helping to straighten the financial affairs of their brother, it is evident they could not fulfill these hopes and wishes by securing the acceptance of that judgment as collateral, but it was not the sole and exclusive reason of their acceptance of the judgment through the medium of an assignment to their

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trustee. Whatever the use which they intended to make of it, they accepted it in partial satisfaction and discharge of their rights under the agreement for royalties with their brother Samuel and parted with a full and ample consideration in fact, and a valuable consideration in law, consisting of the release of the indebtedness to them for unpaid royalties, the grant to their brother of the exclusive right to manufacture the preparations, and their acceptance of a lower rate of royalty for the renewed period of the contract. There is no significance in the evidence, and no inference to overrule the findings of the referee could be derived from the circumstance that one of the trustees for the debtor and defendant, George H. Tilden, was also the person to whom the assignment of the judgment was made and who made the declaration of trust concerning the same. Indeed, no more proper person could have been chosen for the latter purpose, because under the original agreement for royalties, executed long prior to the existence of the claims in question, the same person had been named as the agent of the sisters for the protection and enforcement of their rights thereunder, and as such agent he had, immediately previous to the assignment of the judgment in question, been pressing upon their debtor, Samuel, for the payment of the unpaid royalties. Nor is any significance, sufficient to overcome the findings of the referee, to be derived from the fact that the judgment of one brother was to be offset against that of the other; that was one of the matters presented to Samuel as an inducement or consideration for the assignment of his judgment to the sisters; it was an action upon which, under the circumstances, he probably would have insisted and it is a matter of practice which is frequently sustained and sanctioned in courts of equity. If there had been any fraudulent intent or purpose on the part of the parties it might have been easier and safer to accomplish it in many ways; the judgment of Samuel need not have been assigned at all, and under an existing stipulation the action, in which the judgment subsequently assigned to George was rendered, could have been discontinued, which would apparently leave the full amount of Samuel's judgment in force as a prior lien against the lands or interests in realty of George. In so far as the priority of Mrs. Buchanan's lien is concerned, its legal effect was not increased or diminished by the action taken with the prior judgment; any party could purchase that judgment upon the best terms possible, and, as in this case a valuable con-

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sideration therefor was furnished, the purchase and assignment thereof should not be interfered with to the advantage of a claimant whose rights were always subordinate to the liens of the original judgment. The exception, therefore, that the said assignment of the judgment was collusive and fraudulent because made with the intent to hinder, delay and defraud creditors, must be overruled and the findings of the referee thereon should be confirmed.

It is clearly obvious from a consideration of the testimony and of all the circumstances surrounding the parties, that, whatever the legal effect, it was not the intention of the agent and trustees of the sisters, or of the sisters themselves, that the judgment, which was purchased and assigned, should be merged in the real estate covered by the deed of trust or assignment which had previously been made by the judgment debtor to his trustees, one of whom was the agent or trustee for the sisters. It is difficult to see how the contention that, as a matter of fact, the said judgment was intended to be merged in the fee, could be seriously made and maintained unless it should be based upon the hopes, wishes and intentions of the parties to all of the transactions, that by some use to be made of the judgment it should help to extricate from his financial difficulties the judgment debtor who had previously made conveyances of all of his estate. That there was no intention that the payment, satisfaction or discharge of the judgment was sought to be affected by its assignment is apparent from the evidence that it was not satisfied of record, that no satisfaction piece was requested, that an assignment of the exact sum due thereon was taken, that the legal effect of the transaction was carefully stated, that the amount due thereon and the circumstances of the assignment thereof were precisely recited in a declaration of trust executed by the agent and delivered to the beneficial owners of the judgment, namely, the sisters of the judgment debtor. In the declaration of trust the agent or trustee of the sisters specifically promises that he will use every effort to enforce and collect the judgment and pay the proceeds thereof to the parties entitled thereto; and, consistent with that intention, he has, throughout the entire litigation in this proceeding, insisted upon the payment of the amount due on said judgment from the proceeds of the sale of the land upon which it was a lien. Again, the assignment of the judgment was promptly recorded in the various counties in which

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the lands were situated, and legal notice thereby given to all parties concerned that the judgment was still alive and subsisting. It is evident from the negotiations preceding the execution of the agreements, from the terms of the agreements, from the assignment itself and the action taken thereunder, from the recitals in the declaration of the trust, and from all the surrounding facts and circumstances, that it was the intention of the parties to acquire and hold the judgment for their own benefit, as a valid and subsisting lien against the lands of the judgment debtor, whatever might have been their affectionate and benevolent hopes concerning their ability, through the use of the judgment, to raise money to straighten out the affairs of their embarrassed brother. The question of merger is one of intention of the parties, and even admitting that Slocum, as agent of the sisters, and Slocum, as one of the trustees of the defendant George H. Tilden were the same person, all the attendant facts and circumstances indicate an intention to keep the judgment and its lien alive and subsisting, and should be recognized by law as operative to accomplish that purpose (Clift v. White, 15 Barb. 70; 12 N. Y. 519; Franklyn v. Hayward, 61 How. Pr. 43; Sheldon v. Edwards, 35 N. Y. 279; Smith v. Roberts, 91 id. 470, 475, 476; Bostwick v. Frankfield, 74 id. 207), and in the absence of any expressed intention it will be presumed that the parties intended that which was most for their interest, and judgment will be rendered accordingly (De Lisle v. Herbs, 25 Hun, 485, 487); and an intention to keep the estate separate will ordinarily be implied, if all the circumstances show that the interest of the person in whom they have united would be best subserved by so doing. 15 Am. & Eng. Encyc. of Law, 314. This intent has been implied, and this interest has been recognized and protected by keeping the title distinct, where there is an intervening incumbrance. Payne v. Wilson, 74 N. Y. 348, 354. There was no obligation upon the part of the sisters or their agent, either with respect to Samuel J. Tilden, George H. Tilden or Mrs. Buchanan, to acquire the judgment and secure its payment, satisfaction or discharge, by a merger in the fee of the judgment debtor's estate; and where, as in this case, no such obligation exists, the incumbrance should be in equity considered as subsisting if the attendant facts and circumstances or the inferences derived therefrom indicate that such was the intention of the parties. Champney v. Coope, 32 N. Y. 543; Bascom v. Smith, 34 id. 320,

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324. Giving to the contention of the claimant Buchanan, that the judgment was acquired for the sole benefit of the judgment debtor and for the purpose of using it as collateral security for the loan of money to be used in the payment of his debts, its full force and effect, the case of Pruyne v. Adams, F. & M. Co., 92 Hun, 214, would seem to be applicable. In this case bonds of the mortgagor corporation having been paid by the company were surrendered under an express agreement that they were not to be canceled, but were to be resold to raise money to conduct the business of the company. Even in this extreme case the contention of intervening judgment creditors of the company for merger of the estates was overruled. Nor is there any force in the contention of the claimants that the judgment, having been assigned to one who was the assignee or trustee under a previously executed deed of trust of all of the realty of the judgment debtor, the former lienor estate was merged in the latter. It is evident that there was no uniting of the greater and lesser estate in the same person, for although Mr. Slocum was one of the assignees and trustees of the judgment debtor under the deed conveying all his real estate he was but one of two, the other, Whittlesey, having no connection whatever with the negotiations and agreements for the assignment of the judgment. The judgment was assigned to Mr. Slocum, not as trustee of the judgment debtor, but of the sisters, the real owners, who paid a valuable consideration for the assignment; the interests of Mr. Slocum, as agent and trustee for the judgment debtor, were entirely different and distinct from his interest as agent for the sisters; though in fact the one person, they were in law two separate and distinct persons, and certainly in equity, the judgment must be considered to have been assigned, not to Slocum, but to the three sisters and their legal representatives, the actual and real owners thereof. It is well settled that to accomplish a merger at law or in equity there must be a unity of the two titles or interest in the same legal person, and that if the two titles are held in different interests, as by an individual in one right, and by the same individual in a respective capacity for a different interest, there can be no merger. 15 Am. & Eng. Encyc. of Law, 316, 317. Where the ownership of a claim which is a lien upon lands is united in the same person who holds the legal title to such lands as trustee for himself and another, no merger of the lien will take place and no adverse possession be permitted against it.

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Hasbrouck v. Angevine, 17 N. Y. St. Repr. 738. And executors purchasing a mortgage on lands of their testators can enforce the same against the heirs. Carter v. Holahan, 92 N. Y. 498. Not only must both estates be owned by the same person but in the same right. Skeel v. Spraker, 8 Paige, 182. It is evident, therefore, that the exceptions to the report of the referee allowing the claim of the said Slocum, as trustee for the sisters, upon the ground that the judgment, upon the assignment of which the claim is based, was merged in fact, in law and in equity in the real estate previously conveyed by the judgment debtor to his trustees, should be overruled and the findings of the referee thereon should be confirmed. It follows, therefore, that the said claim should be allowed as found and stated by the referee, and that the exceptions to the allowance thereof should be overruled.

With reference to the claim of the trustees of the judgment debtor against the personal estate under the trust deed or assignment to them, of all his real and personal property, it is evident from the authorities that the referee properly assumed and exercised jurisdiction over the matter. The said trustees having, by agreement dated and acknowledged upon the day upon which the deed of trust was made, covenanted to reconvey to their assignor the entire estate, free from all trusts, upon the written request of the judgment debtor and his wife, and the deed of trust itself providing for the payment of income from the property and the proceeds of sales thereof to the use and benefit, the support and maintenance of the assignor and his family, and for the payment of the indebtedness of the former, the referee properly held that the trust deed was in contravention of the statutes of this State in reference to assignments, and was void at law. He held, however, that the said trustees were entitled to protection in equity for the amount actually paid by them in good faith to the creditors of the assignors out of the moneys raised by them personally upon their note indorsed by the sisters in reliance upon the assignment; that they were thus equitably subrogated as against the personalty thus assigned, to the claims of the creditors, existing at the time, and paid by them, and that they were also entitled to reimbursement of the amounts paid out by them in preserving and maintaining the trust estate assigned to them such as for taxes and assessments levied against the real property. Under the circumstances

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of the case, as disclosed by the evidence, considering the fact that there were, at the time of the assignment, no prior or other liens as against the personalty of the assignor, remembering that the trustees were in no way volunteers or strangers in the matter of paying the claims against their assignor, that it was their duty to pay the debts so far as the funds came into their hands for that purpose and that it was incumbent upon them to protect the trust estate, it must be determined that the findings of the referee, giving them credit for such payments, should be sustained and the exceptions thereto should be overruled. As against the claim of Mrs. Buchanan that the trustees arbitrarily paid from the property, so transferred to them, indebtedness to certain creditors subordinate in point of time to her claim, it must be remembered that she acquired at no stage of the proceedings herein any lien or title as against the personalty of her judgment debtor; the assignment has never been attacked by her until the present proceedings, and at the time of the execution thereof the assignor and the trustees thereunder were justified in believing, from the reversal of the judgment in her favor by the Appellate Division, that she had no claim against the estate of the assignor, and that under the deed of trust they could safely and properly make payments of the debts of their assignor then recognized as valid and subsisting. Under the authorities they were, therefore, entitled to be subrogated to the rights of the creditors to the extent of the amounts paid to them, and the referee has properly allowed their claim for the amount of such payment. 24 Am. & Eng. Encyc. of Law, 285, 292, 294; Hill v. Beebe, 13 N. Y. 556; Snelling v. McIntyre, 6 Abb. N. C. 469; Cole v. Malcolm, 66 N. Y. 363; Patterson v. Birdsall, 64 id. 294; Clark v. Barnes, 76 id. 301, 305; Gans v. Thieme, 93 id. 225, 232; Pease v. Egan, 131 id. 262, 271. There was some contention that the amount of the payments made by the said trustees as allowed by the referee were incorrectly computed; it is evident that a full and careful computation of the same was made with which the court cannot and should not interfere. For these reasons the exceptions of the claimants to the allowance of the claim of the trustees of the defendant George H. Tilden under his deed of trust to them, for the payments made by the said trustees thereunder as found and allowed by the referee should be overruled and the findings of the report thereon should be confirmed.

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With reference to the claim of Barent W. Stryker there can be no question whatever under the evidence proved and under the authorities that the same was properly disallowed by the referee. The said claimant, after the acceptance of 20 per cent. of the amount of his claim from the trustees of his debtor, the defendant George H. Tilden, made and delivered a release of the same in full, accepted the said percentage, retained the amount thereof and has never offered to repay the same. Though familiar with the facts attending the execution of the assignment and familiar with the law applicable thereto, without the knowledge of the trustees of his debtor, he obtained from the latter notes and a bond and mortgage as security for the balance of his claim, and upon a confession from the said judgment debtor he subsequently entered judgment; and upon the bond and mortgage and a judgment entered upon the notes, he now makes claim against the real and personal funds herein. He was, however, properly held by the referee, after his participation in the assignment and his acceptance of moneys thereunder, to be precluded from a share of the same; and because of his subsequent secret negotiations and agreement with the debtor, the notes given to him by the latter for the balance of his claim, the bond and mortgage given to secure the same and the judgment entered thereon, were properly held to be void at law and in equity. Cornwell v. Clement, 87 Hun, 50; Groves v. Rice, 61 N. Y. St. Repr. 654; Hone v. Henriquez, 13 Wend. 240; Rapalee v. Stewart, 27 N. Y. 310, 314.

Other claims were presented to the referee, some of which have been partially allowed without any full and explicit statement or computation of the amount in which they should be permitted to share, because of the fact that the allowance of the claims of Slocum, as trustee for the sisters against the realty, and of the equitable rights to subrogation of Slocum and Whittlesey, as trustees, the entire funds now on deposit are exhausted. The claims of the National Hudson River Bank were subsequent to the assignment to Whittlesey and Slocum, and their security therefor were junior and subordinate to the equitable rights acquired by the acts done under that assignment. But the funds being exhausted, it is not necessary for the court to determine the legal effect of the sale by the said bank and its purchase and application upon the original debt of the securities pledged and

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hypothecated with it by the defendant George H. Tilden as collateral security. Nor need attention be given to the claim of the moving parties that the validity of the assignment by the said defendant to his trustees could not be attacked by the said claimant until the latter had exhausted his legal remedy by the recovery of a judgment and the return of an execution thereon unsatisfied. Nor is it necessary to determine the rights of said claimant to attack the report as to the personalty or to file exceptions or to be heard in opposition to the confirmation of the report. So also the question as to the balance remaining due and unpaid to the claimant Clark is, under the circumstances, in view of the findings above confirmed, purely an academic one. The said claimants have not excepted to the report and a clerical error having been made in the statement of the balance due them, and a stipulation that the same may be properly corrected having been entered into, the report for the purpose of accuracy may be amended in this particular. It appearing that the referee has properly stated the nature, extent and amount of the unsatisfied liens and claim against the shares or interests of the said defendant in both funds, and that he has properly ascertained and reported the equities, priorities and rights of the owners of said unsatisfied liens and incumbrances as between themselves and as against said defendant, and has properly determined and reported the validity of the claims existing against the interests of said defendant, and the rights, priorities and equities of defendant claimants, arising under or by virtue of said assignments, all the exceptions to the report should be, in all things, overruled and the said report should be in all things confirmed. No allowance as costs being payable to the parties unsuccessful upon the reference, and no allowance other than the referee's and stenographer's fees being asked by the successful and moving parties, it will be necessary merely to submit an order confirming the report in all things accordingly.

Ordered accordingly.

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LAWRENCE SCHORR, Plaintiff, *v.* LOUIS GEWIRZ and LOUIS JACOBS, Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Specific performance — Damages recoverable, in the action, for a fraudulent breach although performance is impossible — Their measure.

Although specific performance of an executory contract for the sale of lands cannot be awarded, in an action brought therefor by the assignee of the vendee, because it turns out that the wife of the vendor, neither a party to the action nor to the contract or within the jurisdiction, refuses to convey, damages may be awarded therein against the vendor where he has been guilty of a fraud in regard to the title which would have prevented performance even if his wife had been willing to convey.

The recoverable damages are the payment made on signing the contract with interest thereon, the expenses of searching the title, the difference between the market value of the premises and the contract price, and the costs of the action.

ACTION for specific performance of a contract for the sale of real estate.

H. B. Wesselman, for plaintiff.

Louis Levy, for defendants.

GILDERSLEEVE, J. On October 28, 1901, defendant Gewirz entered into a written contract with one Solomon Antokolitz for the sale to the latter of certain real estate. On the same day the said Antokolitz assigned his interest in the said contract to plaintiff. The plaintiff has performed, or stands ready to perform, all the conditions imposed upon his assignor by the contract, but defendant refused and refuses to carry out the said contract. The defendant claims that he was induced to make the contract by the false representations of the plaintiff in stating that defendant's wife had consented to the sale, whereas he subsequently discovered that she refused to sell at the price fixed by the said contract, and he alleges that he cannot carry out the contract because of the

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refusal of his wife to join in the deed. It is claimed by the plaintiff that defendant's real reason for seeking to avoid the contract is the fact that he has come to the conclusion that he could have obtained more money for the property had he known that Schorr, instead of his assignor, Antokolitz, was the person who desired to buy it, because Schorr owned the adjacent property and needed this real estate of the defendant Gewirz. A few days before the time fixed for the completion of the contract, the other defendant, Jacobs, filed a *lis pendens* against the property, and commenced a suit against the defendant Gewirz to enforce a supposed contract, alleged to have been made in June, 1899, by which Jacobs was to have an interest in the property. Jacobs is the brother-in-law of Gewirz, and plaintiff claims that the *lis pendens* should be set aside for the reason that the suit between Jacobs and Gewirz is part of a fraudulent scheme to give Gewirz an excuse for backing out of the contract on the ground that he cannot deed the property free from all incumbrances, other than the mortgage mentioned in the contract, as he had stipulated to do in said contract. The alleged contract, upon which Jacobs pretends to have founded his said action, in which the *lis pendens* is filed, was not produced in evidence, and no satisfactory reason is offered for Jacob's long delay in bringing his action. I incline to the opinion that the said action of Jacobs against his brother-in-law Gewirz was not brought in good faith, but was an afterthought of Gewirz to enable him to avoid his contract to sell the property. To sustain the claim of misrepresentations, the general rule is that it should appear that the representation was as to a material fact, and was, in point of fact, false; that it was of such a character that the other party had a right to rely upon it; that it was accompanied by knowledge of its falsity, or what the law regards as equivalent to actual knowledge, and by an intent to deceive; that it was relied upon by the other party, and that it did, in fact, deceive; and that the other party has thereby sustained damages. 14 Am. & Eng. Encyc. of Law (2d ed.) 23. All the material allegations of the defense are denied by the plaintiff and his witnesses, and the proof does not sustain the defense of false representations claimed by defendant to have been made by Schorr. The plaintiff has made out a cause of action by a fair preponderance of proof, and is entitled to judgment, but the question presents itself, To what form of relief is he entitled? As Mrs. Gewirz declares positively that she will not

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join in the deed, and as she is not within the jurisdiction of the court, not having been made a party to the action, specific performance of the contract seems to be impossible. However, in a case where specific performance of the contract itself is sought, and it appears on the trial of the action that, because of some act of the vendor or for some other reason, a specific performance cannot be decreed, the court can retain jurisdiction for the purpose of awarding damages for a breach of the contract. See Levy v. Hill, 50 App. Div. 297. The general rule, in a case of an executory contract of sale of land, is that, where there is a breach by an innocent vendor, the vendee can recover only nominal damages, unless he has paid part of the purchase money, in which case he can recover such purchase money and interest. See Mack v. Patchin, 42 N. Y. 171; Margraf v. Muir, 57 id. 159. If, however, the vendor has been guilty of fraud, or if his acts evince knowledge of the existence of a defect or want of authority to convey, or show misconduct, fraud or bad faith in entering into the contract, or in seeking to avoid it for the purpose of obtaining a larger price or an undue advantage, the court will also allow to an innocent vendee, as a measure of damages, the difference between the contract price and the value of the land, thus placing him in the position where he would have been had the contract been performed. Margraf v. Muir, *supra;* Pumpelly v. Phelps, 40 N. Y. 66; Mack v. Patchin, *supra;* Cockcroft v. New York & H. R. R. Co., 69 N. Y. 203, 204. The plaintiff's items of damage, as alleged in the complaint, are as follows: $500 paid on the making of the contract, $260 paid to attorneys for searching the title, and $2,500 as the difference between the $30,000 called for by the contract, and the actual market value of the real estate. On the trial he substantiated all of these claims and proved that on the 25th of November, 1901, the day upon which the contract was to be completed, the market value of the property was $33,000, and that this sum is its value to-day. The complaint, however, demands $2,500, and not $3,000, as the difference between the agreed price and the market value. I am of opinion that the preponderance of proof establishes the claim that defendant Gewirz has shown bad faith in seeking to avoid the contract for the purpose of obtaining a larger price or an undue advantage, and that plaintiff is entitled to $500, with interest thereon from the time of the payment thereof by plaintiff at

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the time of the making of the contract, together with $260, the sum paid by plaintiff for the fees of his attorney for searching the title of the property, and $2,500, the sum demanded in the complaint as the difference between the contract price and the market value of the property, besides the costs of this action. Settle decision and decree on notice.

Judgment accordingly.

HENRY C. JOHNSON, as Trustee in Bankruptcy of the Estate of JACOB KLEINER, a Bankrupt, Plaintiff, *v.* PESACH COHN, Defendant.

(Supreme Court, New York Special Term, November, 1902.)

Bankruptcy Act of 1898 — Trustee's action — Preference — When a transfer intended to hinder creditors avoids the whole consideration whether past or present.

If, within four months of a debtor's filing a petition in bankruptcy and at a time when the aggregate of his property is not at a fair valuation sufficient in amount to pay his debts, a creditor takes a transfer from him which the creditor has reasonable cause to believe is intended to give him a preference and which has that result, the trustee in bankruptcy of the debtor may avoid the transfer and recover of the creditor the transferred property or its value.

If the said transfer was intended to hinder, delay or defraud creditors and the preferred creditor knew this or was put on inquiry in regard to it, he loses the whole consideration he paid whether past or present.

ACTION to set aside a transfer.

Case & Newkirk, for plaintiff.

L. J. Rosett, for defendant.

GILDERSLEEVE, J. On January 18, 1901, one Jacob Kleiner transferred all of his business to the defendant, Pesach Cohn. Less than four months thereafter, viz., on April 30, 1901, the said Kleiner filed a petition in bankruptcy. On May 22, 1901, the plaintiff, Henry C. Johnson, was appointed trustee of the estate

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of said Kleiner. On September 4, 1901, said Kleiner was adjudged a bankrupt. The plaintiff, as such trustee in bankruptcy, brings this action to recover the value of the property transferred, on the ground that the defendant accepted a preference within the meaning of the Bankruptcy Act, and on the ground that the transfer was made to hinder, delay and defraud the creditors of the bankrupt. The Bankruptcy Act, in section 67, subdivision e, provides that "all * * * transfers * * * made or given by a person, adjudged a bankrupt, * * * within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all the property of the debtor conveyed, transferred, assigned or incumbered, as aforesaid, shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors." Again, in section 60, the said act provides as follows, viz.: "(a) A person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. (b) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." Again, in section 1, subdivision 15, the said act provides that "a person shall be deemed insolvent within the provisions of this act, whenever the aggregate of his property (exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors), shall not, at a fair valuation, be

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sufficient in amount to pay his debts." In the case at bar, the plaintiff seems to have relied upon the claim of preference, rather than upon the bankrupt's alleged intent to hinder, delay or defraud his creditors. To establish this claim of preference, it was necessary for plaintiff to prove that the bankrupt was insolvent at the time of the transfer, which was made, as we have seen, within four months previous to the filing of the petition in bankruptcy, and intended to give an advantage to one creditor over the others, and also that the defendant actually received a preference by obtaining a greater percentage of his debt than any other of the creditors of the same class, and also that the defendant had reasonable cause to believe that the said Kleiner was insolvent at the time of the transfer and intended to give an advantage to one creditor over the others. That the defendant obtained a greater percentage of his debt than any other of the creditors of the same class appears to be conceded, as he seems not only to have been paid in full but to have received practically all of the bankrupt's property. The claim of Kleiner's insolvency, at the time of the transfer, is also satisfactorily shown. As we have seen, the statute provides that one is insolvent, within the meaning of the act, when his property (exclusive of that which has been wrongfully concealed or transferred or removed) is not sufficient, at a fair valuation, to pay his debts. Bankruptcy Act, § 1, subd. 15. The bankrupt admitted at the trial that he had no assets beyond those transferred to defendant, which were valued at $1,000, subject to a mortgage of $600, making the total value not more than $1,600; whereas he was in debt to an amount of about $3,500. And, in fact, it appears to be practically conceded that the bankrupt was insolvent at the time of making the transfer. There remains, therefore, but one further fact to be proved, in order to establish plaintiff's claim of a preference, viz.: Reasonable cause on the part of the defendant for believing that the said Kleiner was insolvent, at the time of the transfer, and intended to give an advantage to one creditor over the others by such transfer. The question for determination, in an action brought to invalidate the transfer on the ground of preference, is not whether the transferee had actual knowledge, or even belief, of the intent to give a preference, but whether the transferee, as a business man acting with ordinary prudence, sagacity and discretion, had reasonable cause to believe that the debtor was insolvent and intended by the trans-

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fer to give an advantage to one creditor over the others. Collier Bank. 343, 344. If the facts within the knowledge of the transferee are of such a nature as in reason to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person, and if he fails to make investigation, he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed. The bankrupt swore in supplementary proceedings that he sold his business to defendant Cohn for $1,000; that he owed Cohn, at the time of the transfer, $400, and that Cohn gave him $600 in cash, as the difference between the debt and the value of the property. After stating that he owed about $3,000 at the time of the transfer to Cohn, the bankrupt says, "Cohn knew that I owed money. He did not ask me about it, and I did not tell him. I only told him I was short and could not carry on the business and therefore wanted to sell the property." It appears that the defendant was on rather intimate terms with Kleiner and had had other dealings with him in loaning him money. I incline to the opinion that the defendant had sufficient cause to put him on inquiry, and that he is chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed. His intimacy with the bankrupt and his previous transactions with him would suggest the probability that a reasonable inquiry would have revealed to defendant the insolvency of Kleiner and his intent to give defendant an advantage over the other creditors. The claim of a preference, within the meaning of the statute above quoted, has been satisfactorily established.

The defendant, however, urges that, even so, the antecedent debt of $400 alone is affected, for the reason that the remaining $600, paid by the defendant for the property, was "a present fair consideration," within the meaning of section 67, subdivision e, above quoted, and that defendant was a purchaser in good faith, and consequently comes within the exception mentioned in said section 67, even if the transfer was made by the bankrupt with intent to hinder, delay or defraud his creditors. It is the claim of defendant that as preferences arise only in cases of antecedent debts (see Collier Bank. 355, 356), the plaintiff can at most recover the $400, allowed in payment of the antecedent debt upon the sale of the property to the defendant, unless the plaintiff has established an intent on the part of the

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bankrupt to hinder, delay or defraud his other creditors by the transfer, and has shown that defendant had knowledge of such intent. This intent and knowledge, defendant urges, have not been proved. The testimony shows, as we have seen, that Kleiner transferred practically all of his property to defendant, for $600 in cash and the cancellation of an antecedent debt of $400, at a time when he owed over $3,000 to other creditors, and less than four months thereafter he filed a petition in bankruptcy, having previously spent the said $600. From the whole conduct of Kleiner the conclusion must be drawn that he made this transfer "with intent and purpose on his part to hinder, delay or defraud his creditors," other than defendant, within the meaning of the statute, and consequently such transfer was null and void as against the creditors, "except as to a purchaser in good faith and for a present fair consideration." Bankruptcy Law, § 67, subd. e. Was defendant a purchaser in good faith? In determining the *bona fides* of a purchaser, for a valuable consideration, of land alleged to have been sold in fraud of the rights of third parties, the Court of Appeals held that the question "is not whether the purchaser could have discovered the existence of any fraud by an inquiry; but it is whether, acting as an ordinarily prudent person would have done, he was called upon, under the circumstances, to make inquiry." See Anderson v. Blood, 152 N. Y. 285. As I have above stated, the defendant in the case at bar had sufficient reason to put him on inquiry, which inquiry, under the circumstances disclosed, would have revealed the fraudulent intent of the bankrupt in transferring all his property to defendant for $600 cash at a time when he was insolvent. I am of opinion that defendant is chargeable with knowledge of the fraud of Kleiner by which he profited. The plaintiff is entitled to judgment setting aside the transfer from Kleiner to defendant, and to a recovery of the property so transferred, or its value, for the benefit of the creditors of Kleiner, together with the costs of the action.

Judgment for plaintiff.

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ELIZABETH ILLENSWORTH et al., as Executors of the Last Will and Testament of HARRIET M. KEMP, Deceased, Plaintiffs, *v.* WILLIAM P. ILLENSWORTH et al., Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Will — Republished by codicil — Absolute vesting of the remainder in the widow and issue of a person under a direction that his share be invested for his benefit during his life "and for the benefit of his wife and his issue after his death".

A codicil, referring to a will, and duly executed, republishes the will in so far as it is not changed by the codicil.

The will of Harriet M. Kemp left everything to her husband but provided that in case of his death the estate was to be equally divided between her brother, John B. Mee, her sister, her nephew and her niece. It further provided: "I hereby direct that the share due my brother, John B. Mee, be invested by my executors for his benefit during his natural life and for the benefit of his wife and his issue after his death". After the death of her husband the testatrix made a codicil, "In supplement of the foregoing will", which did not alter the provision above quoted in regard to John B. Mee. He died intestate, after the testatrix, leaving a widow and son.

Held, that the remainder, after his death, vested absolutely in them.

That the contention that they had only an interest for their joint lives, with remainder to the heirs of Harriet M. Kemp, was untenable.

ACTION for the construction of a will.

Isaac Fromme, for plaintiffs.

W. Stebbins Smith, for defendants William P. Illensworth and Florence C. Illensworth.

Archibald L. Van Ness, for defendant Emma W. Mee.

Edwin A. Watson, guardian *ad litem,* for defendant Herbert Mee.

GILDERSLEEVE, J. Harriet M. Kemp, deceased, left a last will and testament by which she left everything to her husband, but provided that, in case of the death of her husband, the estate was

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to be equally divided between her brother, her sister, her nephew and her niece. The will further provided as follows, viz.: "I hereby direct that the share due my brother, John B. Mee, be invested by my executors for his benefit during his natural life and for the benefit of his wife and his issue after his death." The husband died before the testatrix, and, subsequent to his death, she executed a codicil, beginning as follows, "In supplement of the foregoing will, I hereby direct," etc. The codicil in nowise altered the provisions of the will, except by giving $1,000 to one Agnes Timmerman and $1,000 to one Isabella M. Kemp, and by providing for a monument to her husband and requesting her heirs to spend a portion of their income in charity, and by appointing another executor. The will and codicil were duly probated shortly after the death of the testatrix, and thereafter the brother of the said testatrix, John B. Mee, died intestate, leaving a widow and an infant son. The executors of the will of said Harriet M. Kemp bring this action for a construction of the will, and submit the following questions for the determination of the court, viz.: "1. Whether or not the entire will did not lapse after the death of said William M. Kemp, testatrix' husband, or whether it became in operation through and by the provisions stated in said codicil duly executed by said testatrix after the death of her said husband. 2. Whether decedent's brother, John B. Mee, was entitled to his share, devised and bequeathed to him absolutely. 3. Whether the share devised and bequeathed to said John B. Mee was a life estate only, and whether the same in such event is valid. 4. Whether in the event that it is declared that said John B. Mee's interest was a life estate only and the same is invalid, then whether the testatrix died intestate as to that share or interest." All the heirs are made parties to the suit, and their respective counsel arrive at the same conclusion in the construction of the will, except in one particular. It is conceded by all the parties that the only question for the court to decide is whether or not the will left a life estate to defendant Emma W. Mee, the widow of John B. Mee, and to her child, Herbert Mee. The guardian *ad litem* for Herbert Mee and the counsel for Emma W. Mee maintain that one-fourth of the estate, after payment of the legacies, became vested absolutely, at the death of John B. Mee, in equal parts in his widow, Emma W. Mee, and his son, Herbert Mee; while the counsel for the plaintiffs and for defendants William P. and Flor-

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ence C. Illensworth maintain that one-fourth of the estate, after the payment of the legacies, is held for the joint lives of the widow and son of John B. Mee and the remainder is vested in the heirs of Harriet M. Kemp. As the husband of said Harriet M. Kemp died before her, the provision in the will as to him, of course, lapsed. The execution of the codicil, after the death of the husband, was a republication of the will and made the provisions as to the sister, brother, niece and nephew of Harriet M. Kemp, contained in the will, effective; as the general doctrine is well settled that a codicil, executed with the formalities required by statutes for the execution of wills, operates as a republication of the will, so far as it is not changed by the codicil. Brown v. Clark, 77 N. Y. 369–378. As we have seen, the provisions as to the brother, sister, nephew and niece were not changed by the codicil. Under the provision of the will, John B. Mee, the brother, undoubtedly took a life interest in his portion of the estate. He is dead, and the question is as to what became of the remainder. Did it go absolutely to the widow and son of said John B. Mee, or did they only acquire a life interest therein? The wording of the will, as we have seen, is as follows: "I hereby direct that the share due my brother, John B. Mee, be invested by my executors for his benefit during his natural life and for the benefit of his wife and his issue after his death." What is the effect of the words "and for the benefit of his wife and his issue after his death?" The rule is that the court must strive to discover the intention of the testatrix, and give effect to such intention, when it is a legal one. It is also the rule that guesses as to the testatrix' intentions will not be attempted, but the intention is to be collected from the words of the will, free from conjecture, under the guidance of precedents and rules of law, and with a view to the circumstances under which it was made. Red. Surr. (5th ed.) 225. In the case at bar, the attendant circumstances are not disclosed. The rules of law, which may serve to guide the court in the matter here presented, have been clearly set forth in the cases of Hatch v. Bassett, 52 N. Y. 362, and Paterson v. Ellis, 11 Wend. 298. Nothing is said in the will as to the disposition of the share of John B. Mee, after the death of his wife or child, nor is there any definite direction that they are to take a life estate only in said share. In Hatch v. Bassett, *supra,* it was held that "A general gift of the income, arising from personal property, making no mention of the prin-

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cipal, is equivalent to a general gift of the property itself." In the case of Patterson v. Ellis, *supra,* it was held by the old Court of Errors that "It is a well settled rule of construction, that effect must, if possible, be given to every word of a will. * * * It is also a rule of law that a devise of the interest or of the rents and profits is a devise of the thing itself, out of which that interest or those rents and profits may issue. This rule, however, is to be understood with some limitations. Where the intention of the testator to give only the use, is clear, manifest and undisputed, the rule must yield to the stronger force of the intention; but where it is doubtful whether the use only or the absolute ownership was intended to be given, the rule has been allowed to have a controlling effect." In the case at bar there is, as we have seen, no limit as to continuance or time in the provision for the wife and issue of John B. Mee. In the case of Bishop v. McClelland, 44 N. J. Eq. 450, Vice-Chancellor Van Fleet holds that "a gift of the interest, income or produce of a fund, without limitation as to continuance, or without limit as to time, will be held to pass the fund itself, and this effect will be given to a gift made in this form, whether the gift be made directly to the legatee or through the intervention of a trustee." From a careful reading of the will, and in view of the authorities above quoted, I am of opinion that the share of John B. Mee, deceased, became, upon his death, vested absolutely in his widow, the defendant Emma W. Mee, and in his son, the defendant Herbert Mee.

Ordered accordingly.

WILLIAM P. CUNNINGHAM and PHILIP J. KEARNS, Plaintiffs, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Trial Term, November, 1902.)

Municipal corporation — Plan of the work not permitted to prejudice a city's rights under an unambiguous written contract for the work.

Contractors who, after examining the location of a proposed sewer, accept the work under a written contract with a city which provides that they are to prosecute the work at and from as many different points and at such times as the city officials may determine, and

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keep the work at all times and at their own expense entirely free from water, cannot, after completion and payment, recover of the city for extra work upon the contention that they relied upon its plan of the work as a part of the contract, that this plan falsely indicated another sewer as then existing, that they had a right and intended to commence the work at a certain point on the plan, and that, if the other sewer indicated thereon as existing had in fact existed, they could have drained by gravity into that sewer from their own and so have saved the cost to them of pumping out of their sewer the water which percolated into it during the period of its construction.

MOTION by the defendant to set aside verdict of the jury and for a new trial upon the minutes for errors upon the trial and upon the grounds stated in section 999 of the Code C. P.

Kellogg & Rose, for plaintiff.

George L. Rives, Corporation Counsel (Chase Mellen, of counsel), for defendant.

HALL, J. The plaintiffs contracted with the defendant on March 18, 1898, for the construction of a sewer in East One Hundred and Seventy-ninth street, New York city, between Lafontaine and Arthur avenues, and in Arthur avenue, between East One Hundred and Seventy-seventh and East One Hundred and Eighty-first streets.

Arthur avenue runs practically north and south; One Hundred and Seventy-ninth street and the other numbered streets run practically east and west.

The grade of Arthur avenue rises both to the north and south from One Hundred and Seventy-ninth street; the grade of One Hundred and Seventy-ninth street slopes to the east from Arthur avenue to Lafontaine avenue, and there seems to be little question but that the sewer contracted for was intended at some time to have its outlet into a sewer in Lafontaine avenue and One Hundred and Seventy-eighth street.

The plaintiffs completed their contract and received payment in full. They brought this action to recover damages for extra work in making the excavation for the sewer and for pumping the

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surface water from the trench during the progress of the work, and for extra expenses of superintendence, which damage they claim was caused by the defendant in failing to remove a building which stood on One Hundred and Seventy-ninth street near Lafontaine avenue, and which had been condemned in opening One Hundred and Seventy-ninth street, by reason whereof the plaintiffs claim that they were prevented from commencing work at Lafontaine avenue when, they assert, there was to be a sewer which was intended to furnish an outlet for the water which ran into the sewer during the construction of the sewer which they were to build.

The plans and specifications, as well as the contract in question to which they relate, were put in evidence. The plan, in addition to showing the general construction of the work, has upon it certain dotted lines on Lafontaine avenue, which the evidence shows was the usual manner of indicating an existing sewer.

Plaintiffs claim that as the plan was a part of the contract, they had a right to rely upon the fact, and, in making their contract, to assume that the city intended that the One Hundred and Seventy-ninth street part of their sewer should connect at once with this outlet sewer, and thus furnish complete drainage for all water flowing into or accumulating in the sewer excavation during the progress of the work, and that both plaintiffs and defendant entered into the contract in contemplation of that fact.

If the evidence sustains this view there is no reason for disturbing the verdict, which was for a very moderate sum and much less than the damages proven to have been sustained.

It is necessary to examine the facts leading up to the contract, and as they existed at the time the same was made.

The plaintiffs before bidding for the work went on the ground and examined the existing conditions; they saw the building which they claim obstructed the street through which the sewer was to be built, and they saw that there was in fact no sewer in Lafontaine avenue at One Hundred and Seventy-ninth street, but there was a sewer under construction in One Hundred and Seventy-eighth street, running east from Third avenue, and which was to be continued to and along Lafontaine avenue up to and past One Hundred and Seventy-ninth street.

After the making of the contract, and when plaintiffs were ordered to proceed, in March, 1898, the sewer in Lafontaine avenue

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was not completed within a long distance of One Hundred and Seventy-ninth street, and, therefore, at that time and up to May, 1898, there was no outlet sewer for the water to drain into.

The plaintiffs claim that they were first ordered to commence work at Lafontaine avenue and One Hundred and Seventy-ninth street, but could not go on because of the building which obstructed the roadway, and they were then ordered to proceed with the Arthur avenue section, which they did, and after that was finished they worked eastwardly through One Hundred and Seventy-ninth street, and were compelled to pump all the water from their excavation, etc., which would have been avoided except for the obstruction referred to and the failure of the defendant to provide the outlet.

But it is quite patent that if there had been no obstruction in the street when they commenced work they would have been compelled to do the pumping, as there was no outlet built through which the water could run off until about two months thereafter.

The contract is in writing; its terms are clear and unambiguous, and, so far as I have been able to discover it, contains no reference to any existing sewer, and makes no provision for any outlet for water in the excavation during the progress of the work, excepting the marks or lines upon the plan which are said to show the existence of a sewer in Lafontaine avenue; but I doubt very much whether the designation of such a sewer upon a plan could overcome the plain language of the contract. Dean v. Mayor, 167 N. Y. 13. Opinion of Judge Gray, at page 18.

The language of the opinion in that case is instructive upon the point referred to. "The contract expressed, and was intended to express, the agreement of the parties to it and measured the extent of their several obligations; while the plan, in accordance with which the contractor agreed to complete the work, was the chart by which he was to be guided in its performance. There was no ambiguity, no uncertainty, in the language of the contract, and a plan could introduce none. * * * A plan was necessary and the contractor was bound to observe it; but it did not express his obligation, it illustrated its nature. It did not control the contract awarded by the representatives of the municipal government."

The following references to the provisions of the contracts, illustrate the duties of plaintiffs under it: "The work is to be prose-

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cuted at and from as many different points, at such times and in such part or parts of streets, avenues and parks on the line of the work and with such force as the said commissioner of sewers by his engineer may from time to time during the progress of the work, determine," etc.

This would seem to dispose of plaintiffs' contention as to their right to begin the work at Lafontaine avenue and prosecute it at all times so as to carry the surplus water into an outlet at that point.

"The contractor at his own expense, shall keep all the trenches, while the excavation or the construction of foundations and sewer is in progress, free from water and shall provide and keep in operation on the work a steam pump or steam pumps of approved capacity at all times, when notified to do so by the engineer, and shall provide for the disposal of the water so removed in such manner as shall not cause injury to the public health or private property, nor to any portion of the work completed or in progress, nor to the surface of the street, nor cause any impediment to the use of the same by the public."

The specifications call for the bid to include "cost of furnishing and operating all pumps required to keep the work entirely free from water."

These provisions would seem to contemplate that the only way in which the accumulations of water were intended to be removed from the trench was by means of suitable pumps to be provided by the plaintiffs, and to negative any claim that an outlet for the water was to be furnished by the city through any sewer. This is emphasized and made patent by the evidence of plaintiffs' witnesses that in case the outlet had been supplied, there would have been no greater accumulation of water in the trench than could have easily been bailed out by a boy, and then only in the bottom of the trench where it was below the concrete bed and the under wall of the sewer. In fact the witnesses sought to minimize this work, and to show that it was of no importance whatever and had scarcely been considered in their estimate of the cost of keeping the trench free of water. Again the contract provides, on page 15: "All loss of damage arising out of the nature of the work to be done under this agreement, or from any unforseen or unusual obstruction or difficulties which may be encountered in the prose-

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cution of the same or from the action of the elements, is to be sustained by the contractor aforesaid."

And again on page 23 of the contract; "The contractor shall, at his own expense, pump out or otherwise remove any water which may be found or shall accumulate in the trench, and shall form all dams or other works necessary for keeping the excavation clear of water during the progress of the work."

But, perhaps, the clause in the contract which operates most effectually against the plaintiffs' contention is found on page 28. "The building of the sewer shall commence (the printed words 'at the existing sewer in' are stricken out), as shown on the plan of the work and proceed as may be directed by the engineer."

How is it possible for plaintiffs to claim that the defendant agreed to furnish them an outlet through the sewer in Lafontaine avenue in view of this language.

There are many other provisions in the contract which negative the idea that the defendant promised or the plaintiffs understood that they were to have an outlet through the Lafontaine avenue sewer, which was not built. It would require much stronger evidence than the drawing of lines upon a plan which are said to indicate a completed sewer to overcome the very plain language of the contract.

But even if an existing sewer was indicated upon the plan, the plaintiffs were not deceived, for they examined the premises and knew that there was no completed sewer there, and they knew that if it was designated on the plan it was an error.

The plaintiffs' contention in this regard, as I gather it from the brief of counsel, is, that although the sewer in Lafontaine avenue at the time the contract was made, or at the time plaintiffs were directed to proceed with the work, the defendant was bound to wait until the completion of the outlet before ordering plaintiffs to proceed and then was bound to order them to proceed from the outlet and not elsewhere. This claim is specifically negatived by the provisions of the contract in regard to the times and places for commencing the work.

The case of Del Genovese v. Third Ave. R. R. Co., 13 App. Div. 412, is not an authority for the contention of plaintiffs, the provisions of the contracts were entirely different. There can be no question of the soundness of that decision, but it has no application to the facts of the case at bar.

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The case of Horgan v. Mayor, 160 N. Y. 516, seemed to be an authority in favor of plaintiffs, until an examination showed that the facts were entirely different. In that case the contractor had agreed to excavate and remove all the sediment and other materials deposited in the bottom of the pond in Central park near Fifty-ninth street. The contract provided for the drainage of the water through a circular gate resting on the bottom and connecting with a sewer. The Court of Appeals held that the plaintiff had a right to assume that the water could be drained off through this sewer and that his contract to clean the bottom did not contemplate that he should pump all the water out of the lake, but only such part of it as was lying below the standpipe, and in the uneven surface of the bottom.

The sewer became stopped up and useless and the contractor was compelled to pump out the lake. It was very properly held that this work was not within the letter or spirit of the contract, and that the contractor was entitled to make an extra charge for the work.

I am, therefore, constrained to hold that the defendant was not bound to furnish an outlet for the water which accumulated in the sewer in question, either by the terms of its contract or by any fair implication.

The plaintiffs also base their right to recovery in this action upon the fact of the obstruction in One Hundred and Seventy-ninth street near Lafontaine avenue. I have heretofore tried to point out the absolute unimportance of this alleged obstruction from the fact that if it had not existed the plaintiffs could not have commenced their work to any greater advantage at that point than at any other, so long as no outlet was provided. But I find in the contract, at page 12, the following: "Any incumbrances or obstructions which may be upon the line of the work when it is begun, or may thereafter be placed there, shall, if directed by the engineer, be removed by the contractor at his own expense."

There is no direct evidence that the engineer ever gave any distinct directions to remove the building in question, but it is more than questionable whether the contractors were not rather obliged to seek the orders of the engineer for the removal of the building, than to lay the basis of a claim of upward of $8,000 against the city. They did remove it afterward and before the completion of the work at their own expense and it was not a very

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difficult piece of work, for they testify that it was removed in about thirty-six hours, and no claim is made in this action for the work.

The building had been condemned long previous to the making of the contract in question; the title had vested in the city, and there is nothing to show that it would not have been just as easy for the plaintiffs to remove it at the commencement of the work as near its close.

For the reasons stated, it was error to submit the case to the jury and the verdict must be set aside, and a new trial ordered.

Verdict set aside and new trial ordered.

WILLARD B. HOSMER et al., Plaintiffs, *v.* THE STANDARD SHOE MACHINERY CO. et al., Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Leave to a stockholder to intervene in an action against his corporation — Discretionary where the receiver is defending — New issues not to be interjected by an intervenor.

It is discretionary with the court whether it will permit a stockholder and creditor of a corporation to intervene in an action against it which is being defended by its receiver; and usually such leave will be refused unless it is shown affirmatively that the receiver has acted fraudulently, collusively, or manifestly to the detriment of the interests he was appointed to protect.

A person permitted to intervene in an action cannot interject therein a new issue; and will be refused permission to intervene where he is not a party to the contract in suit, except in so far as he is a stockholder of the corporation against which the contract is sought to be enforced.

MOTION to intervene.

Putney, Twombly & Putney, for plaintiffs.

Stern & Rushmore, for petitioner and defendant James N. Darragh.

Wilder & Anderson, for receiver.

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SCOTT, J. In the year 1899 the plaintiffs were the owners of a large proportion of the stock of the Bay State Shoe Machinery Company, a Maine corporation. The defendant Darragh proposed to incorporate a company in New Jersey to be known as the Standard Shoe Machinery Company, for the purpose of acquiring the ownership of or a controlling interest in a number of shoe machinery companies, including the Bay State company. Under the terms of this agreement the plaintiffs were to sell their stock in the Bay State Company for a stipulated amount of the preferred and common stock of the Standard Company; the defendant Darragh undertook that $350,000 in cash should be paid into the treasury of the Standard Company in ten equal monthly payments. He also agreed that the Standard company should assume and pay the obligations and indebtedness of the Bay State Company, which the plaintiffs guaranteed did not exceed $50,000. The Standard Company was incorporated. The plaintiffs delivered their stock in the Bay State Company to the defendant Darragh, by whom it was deposited with the defendant trust company, pending the consolidation of the several companies designed to be consolidated into said Standard Company. It is claimed on the part of the defendant Darragh that a large sum of money was expended by the Standard company in equipping and developing machines and machinery under the patents of the Bay State company. It transpired that the plaintiffs were the principal creditors of the Bay State Company, holding claims against that company to the amount of $42,000. In compliance with Darragh's agreement respecting such debts the Standard company paid to plaintiffs $10,500 in cash, and gave its notes for $31,500, indorsed by said Darragh and one Beecher, who makes this motion to be allowed to intervene. All but $10,500 of those notes have been paid. Differences arose between the plaintiffs on the one hand and the Standard Company and Darragh on the other which culminated in this action by the plaintiffs for a rescission of the contract between themselves and Darragh, in which plaintiffs offered to do all things necessary to restore all parties to their original positions, and obtained an injunction *pendente lite*, restraining the defendant trust company from delivering the Bay State Company stock to Darragh or the Standard Company. The defendant Darragh and the Standard Company, by amended or supplemental answers, while denying many of plaintiffs' allega-

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tions and making countercharges against the plaintiffs, also asked that the agreement be rescinded, offering to return or make good all that had been received under it, so that all parties to the action were in the position of asking this court that the contract between plaintiffs and Darragh be rescinded. Subsequently, and in December, 1901, the defendant McDermott was appointed receiver of the Standard Company in New Jersey, that being the State of its incorporation, and was substituted as defendant in this action in place of the company. He seems to have entered into negotiations with the plaintiffs for a settlement and adjustment of this action, and in March, 1902, submitted to the stockholders and creditors of the Standard company a proposition of settlement which involved the rescission of the contract, upon payment by plaintiffs of the sum of $5,000. A discussion over the proposition took place before the vice-chancellor, who rejected it, and refused to permit the receiver to accept it. Some further negotiations took place looking, on the one hand, toward an increase of the amount to be given by the plaintiffs, and on the other, to the giving of a bond by Beecher. These apparently came to nothing. Thereupon, and in May, 1902, without giving notice to any creditor or stockholder of the Standard company, the receiver obtained from the vice-chancellor an order authorizing him to settle with the plaintiffs for $10,000 and the release of an alleged claim against the Standard company on the basis of an affirmation and confirmation of the contracts between the plaintiffs and Darragh. Under this agreement the receiver agreed to turn over to the plaintiffs all the capital stock of the Bay State company to which the Standard company had any claim and all other property which the Standard company had acquired from the Bay State company, and all claims against Darragh and Beecher. He further agreed to give to plaintiffs access to all books and papers of the Standard company relating to the claims of plaintiffs against Darragh and Beecher, and to aid in obtaining a decree in this action against rescission of the contract. The receiver has accordingly filed a supplemental answer asking that the contract be affirmed. By this action of the receiver the whole controversy in this action has been changed. Whereas in the beginning both parties were asking that the contract be rescinded and the parties put back where they were before the contract was made, now all the parties to the action, except Darragh, are asking that the contract be affirmed, the plain-

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tiffs in the meantime having received back all that they would receive if the contract were rescinded and having also been paid in cash $31,500 of the indebtedness of the Bay State Company to them, and having retained, for what they may be worth, the notes for $10,500 made by the Standard Company and indorsed by Darragh and Beecher. In return they have paid to the receiver $10,000 in cash, and have released an asserted claim of $100,000 against the Standard Company. Beecher, who now seeks to intervene in the action, stands before the court in two aspects. He is a large stockholder in and creditor of the Standard Company, and he is an indorser upon its note held by the plaintiffs, and his right to intervene must be considered in both aspects. Whether a stockholder should or should not be allowed to intervene in an action prosecuted or defended by a receiver is usually said to rest in the sound discretion of the court, and an application for leave to intervene will generally be denied, where it is not made to appear affirmatively that the receiver has acted fraudulently, collusively, or manifestly to the detriment of the interests which he is appointed to protect. In the present case no facts are presented from which the court can determine that the receiver has not acted wisely and for the best interests of the stockholders and creditors generally of the Standard Company. Certainly there is nothing to show that he has acted collusively or in bad faith. It is not made to appear that by the rules and practice of the Court of Chancery of New Jersey it is incumbent upon a receiver to give notice to anyone of an application for advice and instruction from the vice chancellor, and the fact that that officer approved the settlement between the receiver and the plaintiffs affords good ground for assuming that the settlement was a proper one to be made. Furthermore, it is not necessary that the applicant should be made a party to protect any right or interest he may have as stockholder or creditor, for the defendant Darragh is already a party, is evidently in close touch and sympathy with the applicant, and in as good a position as the applicant would be to present to the court any proper consideration in behalf of the stockholders and creditors. Because the settlement effected by the receiver does not fit in with the views and wishes of Darragh and Beecher, is no proof that it may not, nevertheless, be of advantage to the stockholders and creditors generally. Beecher's claim to be allowed to intervene because he is an indorsee upon an outstanding note of

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the Standard Company is even less strong than his claim as a stockholder and creditor. His liability upon the note is not directly involved in this action, and, if admitted as a defendant, he could not interject a new issue into the controversy. Doubtless his position as indorsee would be better, and his defense to any action on the note would be easier if the contract were to be rescinded, than it will be if it is affirmed. But that reason is not a sufficient one to admit him as a party here. The controversy in this action is over the contract to which he is not a party, except as a stockholder in the Standard Company, and in that capacity he is represented by the receiver. The affirmation of the contract will not change the position which he now occupies as an indorser. It will leave him as he is now apparently liable upon the note, and certainly liable to a suit upon it. But the affirmation of the contract by a decree in this action will not on the other hand deprive him of any defense to the note which he now has. In that respect his position will be unchanged.

My conclusion is that in any aspect of the case Beecher is neither a necessary nor a proper party to the action, and that his motion to intervene must be denied, with $10 costs.

Motion denied, with $10 costs.

FRANCIS P. BURKE and WILLARD S. BROWN, as General Managers and Attorneys in Fact for all the Underwriters at the New York and Boston Lloyds, Plaintiffs, *v.* BENJAMIN T. RHOADS, Jr., Defendant.

(Supreme Court, New York Special Term, November, 1902.)

Lloyds insurance — Underwriter's answer of payment — An answer should set up material facts which occurred after action begun and before answer.

Where a Lloyds insurance policy makes the liability of an underwriter individual and separate and limits its amount to a specific sum, it is a defense to an action brought to recover an alleged loss under the policy and brought upon an allegation that a judgment, by agreement establishing the amount of the liability of the defendant as underwriter, has been recovered against him as general man-

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ager and as attorney in fact for all the underwriters, for the defendant to allege that he has already been compelled to make payments, on other policies of the said Lloyds, which exceed his liability as stipulated and fixed by the policy in suit.

Where the said judgment, establishing the amount of the said liability, has on appeal been modified and reduced since the commencement of the present action and before answer therein, the defendant may in his answer set up the modification as a partial defense to the present action and need not, in view of Code C. P., § 544, set it up by a subsequent and supplemental answer.

DEMURRER to answer.

William B. Ellison, for plaintiffs.

Cantor, Adams & McIntyre, for defendant.

SCOTT, J. This is an action against an underwriter of a so-called Lloyds insurance policy. The complaint contains the usual allegation showing the recovery of a judgment against this same defendant as general manager and attorney in fact for the underwriters of what was known as the People's Fire Lloyds; that the defendant was himself an underwriter upon the policy upon which the loss occurred, and that the special funds designated in the policy as the primary source from which losses were to be paid has long since been exhausted. The defendant sets up two defenses, one to the whole cause of action, and one partial, to both of which plaintiffs demur for insufficiency. By the first defense the defendant seeks to avail himself of a limitation upon his individual liability contained in the policy. The complaint as it will be observed does not set forth the facts showing the loss under the policy or the amount of such loss as it would be necessary to do if the action was brought directly upon the policy, but merely alleges that there was a loss and that in an action against the general manager judgment was rendered fixing the loss and the liability upon the policy at a certain sum. This, of course, is the proper practice and finds its justification in a clause in the policy reading as follows: "No action shall be brought to enforce the provisions of this policy except against the general manager and attorney in fact as representing all the underwriters and each of the underwriters hereby agrees to abide the event of any suit so brought as

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fixing his individual responsibility hereunder. Judgment entered in such an action shall be satisfied out of the premiums in the hands of the underwriters unexpended; if such premiums shall be insufficient, then out of the deposit made by the several underwriters; if both shall be insufficient, then out of the individual liability of the several underwriters as hereinbefore expressed and limited." From this clause in the contract, which alone furnishes a ground for this action, it appears that the several underwriters did not pledge their individual liability to an unlimited extent, but only as "hereinbefore expressed and limited." What that limitation was appears from another clause in the policy upon which the defendant relies, and which reads as follows: "The liability of each of the underwriters in case of any loss, and the amount insured by each underwriter shall be his proportionate part of the aggregate amount payable to the insured upon such loss, and no one of the underwriters shall be, in any event, liable under this policy for an amount exceeding five hundred dollars. In no event or contingency shall any underwriter herein be liable for any part of any other underwriter's liability herein, the liability assumed herein by each underwriter being separate and individual only, as if each underwriter had issued to the assured herein a separate policy, their liability being several and not joint. * * * and the total liability of each underwriter on all policies now or hereafter in force after the application of the total unexpended premiums, shall not exceed twenty-five hundred dollars, the original subscription of five hundred dollars each being therein included." The defendant alleges that as an underwriter of the People's Fire Lloyds he has been compelled to pay, and did pay, after the issuance of the policy referred to in the complaint, on policies of insurance of said Lloyds, existing and in force at and after the time of issuance of plaintiffs' policy, and after the application of the total unexpended premiums a sum greatly in excess of $2,500, whence as he claims he has paid his total fixed liability as an underwriter and is not liable in any sum whatsoever to the plaintiffs. I am unable to see why this defense is insufficient. The only liability of defendant to plaintiffs was that which was expressed in the contract between them, and that contract determines the nature and extent of the liability. When the defendant entered upon such a contract it was his right to place such limitations as he saw fit upon the obligations and liabilities

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which he assumed, and it was open to the plaintiffs to make the contract if its terms suited them, and to leave it alone if its terms did not suit them. The entering upon it was purely optional with them, but if they did enter upon it they were bound to take it as it was made. The whole contract must be read together and being so read it clearly appears, so that any one reading the policy must have seen it, that the individual liability of each underwriter upon all policies outstanding or to be issued was not to exceed the sum named. There is nothing any more unreasonable in such a limitation than there is in any limitation an obligor may see fit to place upon his liability upon any contract he may see fit to enter upon. There is certainly nothing more unreasonable in the limitation than there is in the limitation placed by law upon the individual liability of stockholders in ordinary fire insurance companies. The partial defense, to which the plaintiffs demur, sets up that on June 12, 1902 (after the commencement of this action), the judgment against the general manager of the People's Lloyds was reduced, on appeal, whereby the defendant, if liable at all, is liable in a less sum than that claimed in the complaint. Whatever liability the defendant may be under, depends upon the judgment against the general manager, and of course his liability is lessened or wholly obliterated, as the case may be, if that judgment be reduced or reversed. The defendant's point appears to be that, inasmuch as the modification took place after the commencement of the action, the plea of such modification should be contained in a supplemental, as distinguished from an original or amended complaint. In my opinion this objection cannot properly be taken by demurrer, for the defense is sufficient upon its face, by whatever name the pleading containing it may be called. If the defense was improperly included in the present answer the proper remedy was to strike it out. The answer now before me is styled an amended answer. It does not show in what the amendment consists, but I am informed by brief of counsel that it does not consist in the insertion of this partial defense, which was included in the original answer. The question then is whether a modification of the original judgment having taken place after the commencement of the action, but before answer, it could properly be pleaded by the answer, or whether it was the duty of the defendant to first answer without reference to the modification, and then serve a supplemental answer setting up the modification of the judgment.

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The question seems to be answered by section 544, Code of Civil Procedure, which permits the service of supplemental pleadings "alleging material facts which occurred after the former pleading, or of which he was ignorant when it was made," the obvious inference being that facts which occurred before the original pleading was drawn should be included therein.

The demurrer must be overruled, with costs, with leave to plaintiffs to withdraw demurrer and reply upon payment of costs within twenty days.

Demurrer overruled, with costs, with leave to plaintiffs to withdraw demurrer and reply upon payment of costs within twenty days.

MARGARETTA A. BARNARD, Plaintiff, *v.* ABRAHAM P. JERSEY et al., Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Foreclosure — Right to redeem when terminated — Judicial sale not set aside for inadequacy of price alone.

The right to redeem, from a sale fairly made in an action of foreclosure and made to a stranger, is terminated by the sale itself and not by the referee's deed to the purchaser.

A judicial sale will not be set aside for inadequacy of price alone.

MOTION to redeem in an action of foreclosure.

Blandy, Mooney & Shipman, for purchaser.

Lawrence N. Martin, for defendants.

SCOTT, J. The plight in which the defendants find themselves is one which appeals strongly to my sympathy, and I should be glad if I could see my way clear to relieve them. The action is for the foreclosure of a second mortgage for $415, executed no longer ago than January of the present year. The property involved is the home of the defendants, and subject to a first mortgage of $6,000. The action was begun on August 30, 1902, and no question is made but that the summons and complaint were served upon the defendants, or that all the proceedings in the

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action were fair and regular. The defendants did not appear in the action, the reason they give for not doing so being that they were wholly ignorant of the significance and effect of the proceedings to foreclose. As judgment went against them by default, the progress of the action was rapid and resulted in a judgment on September 25, 1902, under which the premises were sold to a person not a party to the action on October 22, 1902, for the sum of $9,350. After the sale the defendant Abraham P. Jersey learned for the first time, as he says, that the action against him was one which had for its object the sale of his property. He at once raised in some way the money necessary to pay the mortgage debt, interest and costs, and tendered the same to the referee with a view to the redemption of the property, and now makes this motion to be allowed to redeem. The plaintiff's attorney and the referee make no objection to the motion, but the purchaser does object and stands upon what he deems to be his legal right to receive a conveyance of the property. The defendants did not make the purchaser a party to the motion, although obviously he was the person most interested in its outcome. He has, however, filed an affidavit and appeared by counsel, and the way is, therefore, open to a consideration of the motion upon the merits. As has already been said the defendants do not charge any fraud, irregularity or oppression in the institution or conduct of the suit, and, therefore, cannot base any claim for relief upon those grounds. They do say that the property is worth more than it sold for, but do not allege any irregularity or fraud in the sale. They cannot, therefore, prevail on this ground for it is well settled that a judicial sale will not be set aside for mere inadequacy of price. The question involved, therefore, resolves itself into whether a defendant's right to redeem is terminated by a sale to a bidder not a party to the action, or survives the sale and is terminated only by the referee's conveyance to the purchaser. Of the rule in chancery before the adoption of the Code of Civil Procedure there can be no doubt. It was expressed by the Court of Appeals in the following language: "In chancery, the foreclosure, and a sale by the master, barred the mortgagor's equity of redemption. A deed was not necessary to accomplish that result." Tuthill v. Tracy, 31 N. Y. 157–162.

The same rule has been expressly declared by the Court of Chancery. Brown v. Frost, 10 Paige, 247. The Code of Civil

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Procedure does not in so many words declare at what stage in the proceedings the right to redeem shall be terminated, where the foreclosure is by action, thus apparently leaving the old equity rule in full force. That this omission is not accidental is indicated by the fact that in the provision of the Code relating to foreclosure by advertisement, which is a purely statutory proceeding, and can gain no aid from the rules of practice in equity, it is expressly declared that it is the sale which bars all claim or equity of redemption. § 2395. Indeed the language of that section shows very clearly that the framers of the Code understood that it was the sale in a foreclosure action which ends the right to redeem. The language is: "A sale, made and conducted as prescribed in this title, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose the mortgage, so far only as to be an entire bar of all claim or equity of redemption, upon, or with respect to, the property sold, of each of the following persons: 1. The mortgagor, his heir, devisee, executor or administrator." The only construction that can be put upon this section is that it was the clear understanding of the codifiers and the Legislature that it was the sale, pursuant to a judgment that barred the right of redemption of the mortgagor, where a mortgage is foreclosed by action. As was said in Coudert v. De Logerot, 30 N. Y. Supp. 114, "where the purchaser (not a party to the action and not connected with any of the parties) purchases a piece of property at a sale fully advertised, and made in accordance with the judgment, his right to complete his sale, and get the benefit of the bargain he has made, should not be taken from him, in a case where he is acting in entire good faith, merely because the parties to the action find that they have made a mistake in allowing him to purchase at the price that he did." The defendants rest their contention, in large measure, upon the recent case of Nutt v. Cuming, 155 N. Y. 309. The opinion in that case must, however, be read in view of the question presented to the court for decision. So read it does not avail the defendants. In that case it appeared that a party to the action held a judgment against the mortgagor, which was at the time of the entry of the judgment of foreclosure a lien upon the real estate, subject to the mortgage. The sale under the judgment did not take place for several years, by which time the judgment had become more than ten years old, and had ceased to be a lien upon the land. The question was

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whether the judgment creditor was entitled to share in the surplus moneys, and this involved the question whether his equity of redemption was barred by the judgment of foreclosure or by the sale under the judgment. The Court of Appeals held that his equity was barred not by the judgment but by the sale. There was no question in the case as between the sale and the conveyance under it, and that question was neither discussed nor considered by the court. It is true that the learned judge who wrote the opinion for the court used, at times, the words "sale and conveyance," as if they were contemporaneous acts, but he nowhere suggests that it is the conveyance, rather than the sale which bars the equity of redemption. In fact he uses language which bears only the contrary construction, saying: "The provision barring others of their interest in, or of their rights of equity of redemption in the mortgaged premises, of necessity relates to the final concluding act, that of a sale of the premises." My conclusion is that the purchaser is entitled to receive a deed upon complying with the terms of sale; that the sale terminated the mortgagor's right, and that no unfairness, oppression or irregularity has been shown which would justify the court in setting aside the sale.

The motion must, therefore, be denied, with ten dollars costs, to be paid to the purchaser.

Motion denied, with ten dollars costs.

EVA K. CONLON, Plaintiff, *v.* THE MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN, MICHAEL J. DWYER, as Executor of the Last Will and Testament of JOHN P. CONLON, Deceased, et al., Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Specific performance — When refused of an oral agreement to provide for a wife by will — Statute of Frauds — Part performance.

Specific performance of an oral contract by which a husband, since deceased, agreed for value, as alleged, to will his wife all his property cannot be enforced by her against his estate where she fails to meet the requirement that such a contract must be established by the clearest and most convincing evidence.

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Where the property in question is wholly real estate, an additional objection to her action arises in the fact that real estate cannot be conveyed by parol and, further, that her alleged payment of the consideration, or services which she alleges that she rendered her husband as part of the consideration, are not such a part performance by her as will take the contract out of the Statute of Frauds.

ACTION to compel specific performance of an alleged oral agreement of a decedent to leave the plaintiff, his widow, all of his property.

George B. Morris, for plaintiff.

Lewis S. Goebel, for defendant executor.

William J. Fanning, for Mission of Immaculate Virgin.

George S. Daniels and B. P. Ryan, for defendants Jones, McGarrick and Covington.

STECKLER, J. In this action the plaintiff, the widow of John P. Conlon, deceased, asks the court to decree the specific performance of an oral contract alleged to have been made by her with the decedent, by the terms of which agreement the husband, in consideration of plaintiff's services and certain sums of money alleged to have been received from her, promised to leave her all the property of which he might die seized or possessed. The decedent made no provision for the plaintiff by his will, which was executed prior to his marriage to her.

On the trial the plaintiff produced several witnesses whose evidence tended to show either that the decedent had provided for the plaintiff, according to the terms of the alleged agreement, or an intention on his part to so provide for her, and also that the decedent, as a consideration for his alleged promise, received $8,500 from the plaintiff.

In a case of this character "the ordinary rules which govern in actions to compel the specific performance of contracts, and which furnish reasonable safeguards against fraud, should be rigidly applied. These rules require that the contract be certain and definite in all its parts; that it be mutual and founded upon an adequate

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consideration; and that it be established by the clearest and most convincing evidence. Even then, when the contract limits a man's right to dispose of his property by will, it is regarded with suspicion and enforced only when it is apparent that the hand of equity is required to prevent a fraud upon the promisee" (Gall v. Gall, 64 Hun, at p. 603).

Tested by these rules the plaintiff's case is fatally defective. The proof rests entirely on the husband's declarations, and the testimony of plaintiff's witnesses is contradictory and improbable. So that instead of the agreement being established by the "clearest and most convincing evidence" the testimony adduced in support of the case is unreliable (see Crouse v. Frothingham, 97 N. Y., 105; Winne v. Winne, 166 N. Y., 263).

Even if it were otherwise there could be no recovery herein. Nearly all of the decedent's property was real estate, and since the death of the defendant executor Dwyer, plaintiff has waived any claim she might have to the small amount of personal property. It appears to be well settled that equity will not decree specific performance of an oral contract to convey or devise real property, such agreement being void under the Statute of Frauds, even where all of the purchase price has been paid, or, where ordinary personal services constitute the consideration, when such services have been rendered. The payment of the price or the rendition of the services does not constitute such performance on the part of the vendee or promisee as to take the agreement out of the operation of the statute. The recovery of the purchase price of the property is deemed a full indemnity to the party by whom the money was paid; and as the money value of the services is readily ascertainable, such value is recoverable in an action at law (Ludwig v. Bungart, 48 App. Div., 613; Cooley v. Lobdell, 153 N. Y., 596). The plaintiff was never in possession of the real property in question, and her void contract gives her no standing in this suit for specific performance, the estate being abundantly solvent.

Without considering the further question whether this suit is barred by the prior actions for dower and for a construction of the will of the decedent (Jordan v. Van Epps, 85 N. Y., 427), it follows that there must be judgment for the defendants.

Judgment for defendants.

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LEWIS G. WHITE, Plaintiff, v. LOYAL L. JACKSON et al., Defendants.

(Supreme Court, St. Lawrence Special Term, November, 1902.)

Demurrer overruled — Application to plead over where made.

Where an interlocutory judgment, overruling a demurrer to a complaint with leave to withdraw the demurrer and plead over, is on appeal affirmed in the Appellate Division without granting such leave, the defendant must under Code C. P., § 497 apply to that tribunal, and not to the Special Term, for such leave.

MOTION by the defendants to withdraw a demurrer to the complaint and serve a proposed answer.

Joseph F. Brown, for plaintiff.

Worth Chamberlain, for defendants.

KELLOGG, J. M., J. In an action to recover the royalties upon a so-called lease of mineral rights the defendant interposed a demurrer, which the Trial Term overruled, allowing the defendants, within twenty days, upon the payment of costs, to withdraw the demurrer and plead anew, otherwise directing judgment for the amount demanded in the complaint. The defendants appealed to the Appellate Division from the judgment so entered and the order overruling the demurrer, and the judgment of the Trial Term was affirmed. The Appellate Division did not grant leave to withdraw the demurrer and plead anew. The defendants now ask leave of this court to withdraw said demurrer and to serve the answer accompanying the moving papers. It is at least very doubtful whether the proposed answer sets up a defense. The fifth proposed answer alleging that the lease was void as a lease of agricultural lands, is without merit. Massachusetts Nat. Bank v. Shinn, 163 N. Y. 360.

The fourth proposed answer alleges that the defendants notified the plaintiff that they did not intend to mine or open the quarry. This allegation does not meet the terms of the contract which provides that the defendants may cancel the contract. The allegation

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that the plaintiff neglected to execute proper papers to perfect the title or rights, does not state any defect in the title or that any papers were requested. The fourth answer proposed foreshadows, perhaps, a defense which, upon being fully stated, may be available. We, therefore, prefer to place this decision not upon the insufficiency of the answer, but upon the ground that this motion should have been made at the Appellate Division rather than at the Special Term. The language of the Code of Civil Procedure (§ 497) provides that "Upon the decision of a demurrer, either at a general or special term, or in the court of appeals, the court may, in its discretion, allow the party in fault to plead anew or amend, upon such terms as are just." The fair reading of this section would seem to indicate that the court referred to is the court which decides the demurrer,— in this case the Appellate Division. The cases cited by the defendants do not support their contention. Piper v. Hoard, 19 N. Y. St. Repr. 303; Terry v. Moore, 12 App. Div. 396.

In each of those cases the decision of the demurrer was by the Court of Appeals, and, by the judgment overruling the demurrer, leave was granted to the party at fault to apply to the Special Term for leave to withdraw the demurrer and plead anew.

Under section 171 of the Code of Procedure the Court of Appeals had not the power to allow the party in default to plead anew, but the General Term and Special Term had the same power as they now have in that respect. But it was held that the judgment of the Court of Appeals overruling the demurrer was conclusive upon the defendant. Whiting v. Mayor, 37 N. Y. 600.

By that decision it would seem that the Special Term had no power to act after the Court of Appeals had overruled the demurrer. The Legislature, by changing this section of the Code of Procedure, evidently intended to remedy that defect, and to give the Court of Appeals overruling a demurrer the power to allow the party to plead anew if, in its discretion, such action was proper.

The judgment of the Appellate Division in this case stands upon the summons, complaint and demurrer. Not having granted leave to withdraw the demurrer, the Appellate Division has in fact caused a final judgment to be entered; and if this judgment is broader than was proper, or than the court intended, relief should be sought in that court and not here.

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The motion should, therefore, be denied, with ten dollars costs, to be paid by the defendants, without prejudice to the right to renew the motion should the Appellate Division permit such motion to be made at Special Term.

Motion denied, with ten dollars costs, to be paid by defendants, without prejudice to renew motion.

Matter of the Appraisal for Taxation of the Estate of JOHN PAGE, Deceased.

(Surrogate's Court, Clinton County, November, 1902.)

Transfer tax — Not leviable upon the exemptions given a widow by Code C. P., § 2713.

In view of the declaration of Code C. P., § 2713, that if a man having a family dies leaving a widow and no minor child the articles enumerated in said section "shall not be deemed assets" but shall belong to her, they form no part of his estate and are not subject to the transfer tax, whether or not they were actually set apart to her by the appraisers and whether or not he died testate.

APPEAL by the administrators from the order of the surrogate of Clinton county, confirming the report of the county treasurer, determining the value of the estate of decedent, and assessing the tax thereon.

Everest & Signor, for administrators.

Potter, Kellogg & King, for Comptroller.

BOOTH, S. John Page died intestate at Champlain, N. Y., September 6, 1896, leaving surviving his widow and five children, all of age, to whom his property passes. His sons John H. Page and Philip J. Page were appointed administrators. No inventory of the estate was made.

The exemptions for the widow, specified in section 2713 of the Code, were not set apart to her. The appraisal by the county treasurer fixes the net value of the personal estate of decedent,

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after deducting debts, funeral expenses, and expenses of administration, at $10,199.51. Included in this sum was the household furniture of decedent, which was valued at $100. The administrators claim that there should be deducted from this sum of $10,199.51 the item of $100 household furniture, and $150 in cash, the same being the widow's exemptions under section 2713 of the Code, and that these two items should not be included in estimating the value of the property of decedent subject to transfer tax.

If this contention is correct, the property of decedent "passing or transferred," is only $9,949.51, and, therefore, not subject to tax. I am referred to no decision in which this point is directly passed upon by the courts, but am of the opinion that the property specified in section 2713 of the Code, should not be included in estimating the value of the estate subject to tax.

If the estate is taxable it is so under subdivision 1 of section 220 of the Tax Law. This provides that "When the transfer is by will or by the intestate laws of this state," there shall be a tax, etc.

The property did not pass by will. It remains to consider whether it did pass by the intestate laws of the State. The term "intestate laws" is intended to cover the Statute of Descents which relates to the descent of real estate, and the Statute of Distributions, which provides for the distribution of the surplus of the personal property of decedent after the payment of his debts, and legacies if he left a will, and after the setting apart to the widow and minor children of the exemptions specified in section 2713. These exempt articles are in no way governed by the Statute of Distributions.

Without tracing the origin and history of these exemptions, it is sufficient to say that the household furniture and the $150 are statutory exemptions set apart to the widow and minor children and "shall not be deemed assets." They pass to the widow regardless of the fact whether decedent was testate or intestate. If testate, he cannot by will defeat this provision which the law makes for the benefit of his family. If intestate, his administrator has no power or authority over this property, except to inventory and set it apart to the widow and minor children.

Where, as here, there is no minor child, the widow takes title to it absolutely by the express terms of the statute.

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If this property is to be included in estimating the value of the estate subject to tax, then the property itself and the widow who receives it are both subject to the provisions of sections 222 and 224 of the Tax Law relating to the enforcement and collection of the tax.

Section 222 provides that the "tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is so transferred, * * * shall be personally liable for such tax until its payment."

Section 224 provides that "Every executor, administrator or trustee, shall have full power to sell so much of the property of the decedent as will enable him to pay such tax.

"That any such administrator, executor or trustee having in charge any legacy or property for distribution subject to such tax shall deduct the tax therefrom. * * * That if the property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto.

"That he shall not be compelled to deliver any * * * property subject to tax to any person until he shall have collected the tax thereon." It is at once apparent that the power thus conferred upon the executor or administrator is directly contrary to the intent and spirit of the statute exempting this property. The property is intended for the sole benefit of the widow and minor children, and the executor or administrator has no power to withhold any part of it as provided in the Tax Law. He must turn it over to the widow intact. Crawford v. Nassoy, 55 App. Div. 433; Matter of Williams, 31 id. 617.

If the property is taxable, then the Legislature has imposed a tax which cannot be collected.

An interpretation of the law which leads to such an irreconcilable state of things seems to us unreasonable and contrary to the whole intent and spirit of the law which sets apart these exemptions for the widow.

The fact that no inventory was made, and that the furniture and cash have not been set apart to the widow does not alter the situation, as the property is hers absolutely, and the administrators can be compelled to turn it or its equivalent over to her at any time.

As to the items of interest on the two certificates of deposit in the Champlain Bank, the evidence discloses that the certificates drew

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interest at four per cent if they were allowed to run six months. If the administrators had not collected interest, they could very easily have proven that fact. They did not do this, and it is fair to presume that they collected the interest. I am, therefore, of the opinion that these two items of $1.88 and $55.74 are properly included in the appraisal, but deducting the widow's exemptions of $100 household furniture, and $150 in cash, leaves the value of the estate passing to the widow and children under the intestate laws of the State, less than $10,000, and, therefore, not subject to tax. The report of the county treasurer and the order of the surrogate are, therefore, reversed.

Report of county treasurer and order of surrogate reversed.

Matter of the Transfer Tax upon the Estate of PETER THOMAS, Deceased.

(Surrogate's Court, New York County, November, 1902.)

Transfer tax — Compromise of a disputed claim — Deduction of disbursements to protect at law, or buy peace for, the estate.

Where an administratrix makes an advantageous compromise of a claim, existing in favor of her estate, and which was disputed by a third person, the transfer tax is to be imposed only upon what she received in settlement of the claim and not upon its face value.

Disbursements honestly and properly made by a personal representative, in asserting by litigation a right of the estate or in defeating an attack upon it or in buying peace for it, should be allowed the representative and be deducted in a proceeding taken to fix the transfer tax on the estate.

APPEAL from an order assessing and fixing the transfer tax.

Winston H. Hagen (Edward B. Whitney, of counsel), for administratrix.

Willoughby L. Webb, for Joseph Engel.

Edward H. Fallows, for State Comptroller.

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THOMAS, S. The decedent died, intestate, in this county (New York) on March 30, 1900, and letters of administration were thereafter duly issued. Proceedings to determine the transfer tax were instituted, which resulted in an appraisal and the making of an order by a surrogate fixing the tax on the footing of the appraiser's report. From the order so made this appeal is taken. The facts involved in the controversy are not disputed. The only assets of the estate of the decedent were eight savings bank accounts, or such rights in them as belonged to the decedent at the time of his death. These eight accounts were all in the joint names of the decedent Peter Thomas and his wife Jane Thomas, who had predeceased him, and they were in as many different savings banks. The pass-books evidencing them were in the possession of one Isabella Engel, who claimed title to them as having been given to her by Jane and Peter Thomas, either as a gratuity or as a consideration of her promise to remain with, care for and support Peter Thomas until his death, which promise she alleged that she had performed. Actions were commenced in the Supreme Court, by the administratrix, against each of the savings institutions, in each of which Isabella Engel was interpleaded and asserted her claims of title. No trial was had in any of the actions, but an agreement of compromise was made on the basis of permitting the administratrix to receive seventy-five per centum of the amounts deposited, while Mrs. Engel was to have twenty-five per centum. This arrangement was consummated by permitting Mrs. Engel to have judgment in her favor in one of the actions, and entering judgment by stipulation in favor of the administratrix in the others, leaving a sum of money to be paid in cash by the administratrix to Mrs. Engel; but these were matters of form, and the substance of the settlement was that the administratrix was to have three-fourths of the deposits and no more.

Upon these facts the appraiser reported that the estate of the decedent was, for the purposes of taxation, of the value of the gross amount of all of the savings bank accounts, and he refused to deduct or allow the amount Mrs. Engel was paid or permitted to collect therefrom.

This does not appear to have been on the theory that the compromise and settlement made by her with Mrs. Engel was not a proper or wise thing to do in the interest of the persons entitled as next of kin, of whom she herself was one, or because of any

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doubt that it had actually and in good faith been carried out. All of the facts seem to show that the compromise was, from the standpoint of the administratrix at least, an excellent one for her to make. She had power, even without the approval of a surrogate, to make an honest and prudent settlement, and will not, for doing so, on her accounting be charged with any sum in excess of its actual benefits to her estate. Thompson v. Brown, 4 Johns. Ch. 620; Murray v. Blatchford, 1 Wend. 583; Matter of Scott, 1 Redf. 234; Gillespie v. Brooks, 2 id. 349; Shepard v. Saltus, 4 id. 232; Leland v. Manning, 4 Hun, 7; Chouteau v. Suydam, 21 N. Y. 179; approved in Wood v. Tunnicliff, 74 id. 38.

The appraiser might properly have appraised the value of the disputed claim of the estate of the decedent to the savings bank accounts, at the amount actually received by the administratrix on the adjustment. As a matter of fact the disputed claim was not worth par, and was only worth three-quarters of par. Or he might have reached the same result by appraising the entire fund, as he did, and then allowing the amount paid to Mrs. Engel as an expense of administration. The learned counsel for the State Comptroller is in error in supposing that disbursements, honestly and properly made by an executor or administrator in litigating to assert a right of the estate, or to defeat an assault upon it, or even in buying peace for the estate, can be disallowed as a deduction in a proceeding to fix a transfer tax, on any theory that the State of New York has rights in excess of those of the parties interested in the estate. The tax is based, not on the gross amount of the claims made on behalf of the estate, but on the amounts actually transferred by operation of our laws to the parties interested in the estate. Every just and proper disbursement made by an executor or administrator, as a necessary or proper expense of administration, to which the executor or administrator will be entitled to be credited on his accounting with his *cestui que* trust, must also be credited in appraising the values of the interests transferred to those *cestui que* trust for purposes of taxation. Matter of Gihon, 169 N. Y. 443.

The rule laid down in Matter of Westurn, 152 N. Y. 93, 102, in refusing to deduct from the value of the estate the expenses incurred by the next of kin in a successful will contest, has no application to a case where the disbursement is made by the legal administrator of the estate. In the Westurn case the transfer

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from the decedent took effect and was taxable before the next of kin could recoup their expenses out of it. Where the legal representative makes a proper payment in the course of administration, the transfer from the estate is subordinate and subject thereto. Matter of Gihon, 169 N. Y. 443, 445; Matter of Maresi, 74 App. Div. 76, 79–81; Estate of Haren, N. Y. L. J., Aug. 15, 1902.

The remaining objections to the order appealed from concern the refusal of the appraiser to allow all of the moneys alleged to have been paid by the administratrix for services rendered by counsel in these savings bank litigations and for other expenses incident to the administration of the estate. The evidence as to these matters, contained in the record, is exceedingly meagre and unsatisfactory. The attention of counsel on the hearings seems to have been directed almost exclusively to the main question in the case, and it may have been assumed that the charges claimed for expenses of administration were not disputed. The order appealed from is reversed and the matter is remitted to the appraiser for further hearing and report.

Order reversed and matter remitted to appraiser for further hearing and report.

Matter of the Judicial Settlement of the Account of Proceedings of HARRIET E. GRAHAM and FRANK W. WHITE, as Executors, etc., of ELIZABETH M. WHITE, Deceased.

(Surrogate's Court, Westchester County, November, 1902.)

Jurisdiction — Not conferred on a surrogate by a waiver of the issue of a citation, executed before any proceeding had been taken.

Where a proposed judicial settlement of the accounts of executors had not been commenced either actually or constructively at the time when a person who would be a necessary party to such a proceeding duly executed a waiver of the issue and service of a citation therein and also consented to a decree of settlement, the surrogate held that no jurisdiction over the said party was thereby acquired or conferred.

PROCEEDINGS upon the judicial settlement of the accounts of executors.

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Frederick H. Denman, for executors.

No other appearances.

SILKMAN, S. The petition filed herein October 17, 1902, recites that one Annie G. Ferguson, residing at Pall Mall, London, England, is a legatee under the will of Elizabeth M. White, deceased. She is, therefore, one of the persons necessary to be cited in this proceeding. Code, § 2728.

In order to give the court jurisdiction over this legatee the executors file an instrument in which said legatee waives "the issue and service of a citation in the above-entitled matter and consents that a decree may be made settling the final account of said Harriet E. Graham and Frank W. White, as executors, to be filed herein, on or about the 17th day of October, 1902." This instrument is dated and acknowledged before the acting United States consul at Liverpool, on the 2d day of October, 1902, fifteen days before the filing of the petition by said executors under said section 2728. No proceeding had been actually or constructively commenced when the legatee executed her waiver and consent. I do not think the surrogate has acquired jurisdiction of this legatee by the execution of this instrument.

Section 2516 of the Code of Civil Procedure provides: "Except in a case where it is otherwise specially prescribed by law, a special proceeding in a surrogate's court must be commenced by the service of a citation, issued upon the presentation of a petition. But upon the presentation of the petition, the court acquires jurisdiction to do any act, which may be done before actual service of the citation."

Section 2728 provides for the presentation by an executor of his account and a written petition, duly verified, praying for the settlement thereof, and that the proper parties, including legatees, might be cited to attend the settlement.

Section 2517 provides that: "The presentation of a petition is deemed the commencement of a special proceeding, within the meaning of any provision of this act, which limits the time for the commencement thereof. But in order to entitle the petitioner to the benefit of this section, a citation issued upon the presentation of the petition, must, within sixty days thereafter, be served, as prescribed in section 2520 of this act, upon the adverse party, or

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upon one of two or more adverse parties, who are jointly liable, or otherwise united in interest; or, within the same time, the first publication thereof must be made pursuant to an order made as prescribed in section 2522 of this act."

Section 2520 provides how a citation may be served within the State, and also that in case the person to be served is an adult and not incompetent, he may assent in writing to the service within a shorter time than that fixed by this section.

Sections 2522, 2524, and 2525 provide for service without the State and upon nonresidents.

Section 2528 provides that: "The issue and service of a citation may be waived by a party in any proceeding by an instrument in writing, acknowledged or approved as a deed entitled to be recorded, or by personal appearance or by his attorney with written authorization executed and acknowledged as a deed and filed in the office of the surrogate." It also provides that: "The appearance of a party, against whom a citation has been issued, has the same effect, as the appearance of a defendant, in an action brought in the supreme court."

Section 2474 provides: "The surrogate's court obtains jurisdiction in every case by the existence of the jurisdictional facts prescribed by statute, and by the citation or appearance of the necessary parties."

It seems clear from the provisions quoted, which appear to be all that affect the question of jurisdiction, that the surrogate obtains jurisdiction of the proceeding in his court by the presentation and filing of a petition setting forth the necessary jurisdictional facts, and of the parties, either by the issue and service of a citation as provided by the Code, or by the waiver of such issue and service pursuant to section 2528, or by an appearance by an attorney accompanied by a written authorization executed and acknowledged as provided by that section.

It needs the citation of no authority to sustain the proposition that a surrogate obtains jurisdiction of a proceeding and of parties only pursuant to the statute.

The question now arises whether the execution of a consent and waiver prior to the institution of any proceeding confers upon the surrogate jurisdiction over the party executing such consent and waiver. While it is true that a practice recognizing such waivers and consents has grown up and is permitted in some Sur-

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rogates' Courts, nevertheless, I fail to appreciate the authority for it. What more is it than an agreement not to demand notice of the proceeding, and is it of any greater legal efficacy as dispensing with the process of the court than if it had been executed at or even before the probate of the will? It is not an instrument executed in the action or proceeding, because there was no proceeding in existence. I cannot help regarding it as analogous to an agreement waiving the issue and service of a summons and consenting to judgment, executed at the time of the giving of an obligation upon which judgment is to be obtained; or analogous to a consent by a party taking a deed of an undivided interest in real estate to the effect that judgment of partition in an action to be brought may be taken without service of the summons. In some States, by express statutory provision, a maker of a promissory note may at the time of making stipulate that upon failure to pay judgment may be entered without notice. These are known as judgment-notes, but I take it that no such procedure can obtain without express statutory provision.

Suppose the party executing the waiver had been induced so to do by false representations, or by mistake as to the effect of the paper executed. Concededly there is no consideration for the waiver, and even if there were, public policy would be against holding such waivers effective under the well-established doctrine of constructive fraud. Certainly a party executing such a paper would have a right to a day in court upon the defenses indicated. If, however, the waiver was executed after the surrogate had obtained jurisdiction of the proceeding, any sharp practice, or any undue advantage taken in obtaining it could be summarily punished and the danger of trifling with the court would deter those who might otherwise attempt to take an undue advantage by agreement.

I undertake to say that as a legal proposition, a person cannot be said to have waived his day in court, to which he is entitled by fundamental law, until the action or proceeding has been instituted in which the party is entitled to a day. And that such a day in court cannot be waived until the party making the waiver has had notice, constructively at least, by the institution of the action or proceeding of just what issue or right is waived.

Appearing gratis in a proceeding before it has been commenced, or before the court has acquired jurisdiction of it, is unknown to

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the law. We find it laid down in Barbour's Chancery Practice (Vol. 1, p. 81): "Appearing gratis, is where the defendant, on being informed that a bill has been filed against him, causes an appearance to be entered for him without waiting to be served with a subpœna."

In Merkee v. City of Rochester, 13 Hun, 157, the court said (p. 160): "The want of a process to bring a defendant into court may, it is true, be waived by a voluntary appearance in the suit; but a voluntary appearance, to be effectual for this purpose, must be with knowledge that there is a suit pending and with a full intention to appear therein." This was an action arising under the criminal law, nevertheless, I can see no reason for distinguishing the rule laid down by the General Term in that case.

The case of Duer v. Fox, 27 Misc. Rep. 676, does not conflict with the general doctrine for which I contend. That was a mechanic's lien case brought under the statute, in which a verified complaint had been filed, together with a *lis pendens*, and in the latter it was stated that an action had been commenced to foreclose the lien. The court permitted the defendant to voluntarily appear to protect his interests in the action, because the initial proceeding had been taken under the statute by the filing of a complaint and *lis pendens*, and the plaintiff was entitled to sixty days within which to complete the service of the process and hold the jurisdiction of the court. There the defendant had been prejudiced by the filing of a lien upon his property, and a step in the proceedings to give the court jurisdiction had already been taken. In the case before us, no steps had been taken to initiate the proceeding, or to give the court jurisdiction, either of the subject-matter or of the parties, prior to the execution of the consent and waiver.

I have diligently searched for some authority holding that a necessary party has had his day in court by reason of the execution of a waiver and consent purporting to be made in a proceeding which is only in contemplation, but find none. On the contrary, the authorities are many and uniform that where waiver and consent have been relied upon to confer jurisdiction and to give a day in court, always have the proceedings been begun and were pending when they were given. Specific reference to such pending proceedings are always to be found in the waiver and consent.

I must, therefore, hold that the court cannot take notice of a

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waiver of the issue and service of a citation, or a consent to judgment executed prior to the time that the court obtains jurisdiction of the proceeding which may be contemplated. No judgment in this matter can be entered binding upon the legatee, Annie G. Ferguson.

Decreed accordingly.

THE VILLAGE OF BROCKPORT, Plaintiff, *v.* MYRON W. GREEN, Defendant.

(Supreme Court, Monroe Special Term, November, 1902.)

Villages — Proposition for a village sewer system must be submitted at an election to the qualified voters.

The Village Law (L. 1897, ch. 414, §§ 260, 261, 263) requires a proposition for the adoption by a village of a sewer system to be submitted, in the form required by the statute, at an election to the voters of the village qualified to vote thereat, and therefore village bonds, issued by virtue of a proposition, adopted by a majority of all the voters of the village, and which merely embodied a prior resolution passed by the village trustees authorizing them to borrow a certain sum to construct a sewer system and raise the money by tax, are void and the village may show that fact even as against a *bona fide* holder.

DEMURRER to answer.

Dean & McArthur, for plaintiff.

William T. Plumb, for defendant.

NASH, J. The demurrer to the answer raises the question whether a proposition for the construction of a sewer system for the village should have been adopted at a village election in the manner provided by law.

Section 260 of the Village Law (Laws of 1897, chap. 414) provides that "The board of sewer commissioners of a village may establish and maintain a sewer system therein. Before taking any proceedings for the construction of a sewer, the board, at the

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expense of the village, shall cause a map and plan of a permanent sewer system for such village to be made, with specifications of dimensions, * * * and procure the approval thereof by the state board of health.

"§ 261. Upon the adoption of a proposition therefor the whole or any part of the sewer system may be constructed at the expense of the village. The proposition shall describe the portion of the system proposed to be so constructed, and shall also contain a statement of the estimated maximum and minimum cost thereof.

"§ 263. Upon the adoption of a proposition therefor, the whole or any part of the sewer system may be constructed at the joint expense of the village and of the property benefited. The proposition shall describe the portion of the system proposed to be so constructed, shall contain a statement of the estimated maximum and minimum cost thereof, and also the proportion of the expense to be assessed upon the village at large, and the aggregate proportion to be assessed upon the property benefited. If the proposition be adopted such aggregate proportion shall be equitably adjusted with reference to the benefits to be derived therefrom."

Section 264 provides for the construction of sewers wholly at the expense of the property benefited, upon the petition of property owners upon a street or streets.

"§ 266. The board of sewer commissioners of a village authorized to construct the whole or any part of a sewer system shall advertise for proposals for the construction thereof, either under an entire contract or in parts and sections, as the board may determine. * * * No contract shall be made by which a greater amount shall be agreed to be paid, than the maximum stated in the proposition or in the petition for the construction of such sewer."

Section 268 and sections following provide for the apportionment of a local assessment, if the expense of constructing the sewer or any part of it is to be assessed upon the lands benefited, and for an appeal and reapportionment, if ordered.

"§ 274. The expense of constructing a sewer or a sewer system may be raised in an entire amount or in smaller sums from time to time as the board of sewer commissioners may determine. If any portion of such expense is to be borne by the village, bonds or certificates of indebtedness may be issued therefor. If such expense or any part thereof is to be assessed upon property bene-

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fited, the same is to be assessed in accordance with the apportionment and ratio established under this article."

These sections together with prior sections of the Village Law furnish a complete plan of procedure for the submission for adoption of a proposition for a sewer system at either an annual or special election called for the purpose, and take the place of the provisions of the act for the construction of sewers in incorporated villages, enacted in 1889 (Laws of 1889, chap. 375), which in express terms provided for the submission of the question of construction and the apportionment of the expense thereof to the voters at an election.

The two articles of the Village Law next prior to the one containing the sections to which reference is had, articles 8 and 9, provide for the submission at a village election of propositions for supplying a village and its inhabitants with water and light. These articles in express terms provide for the submission of questions as to water and light for adoption at an election.

The provisions of the article on sewers as unmistakably indicate that a proposition for the adoption of a sewer system shall be submitted at an election to the voters of the village qualified to vote thereat. The word "proposition" acquires a definite and determinate meaning in the sections of the Village Law providing for the method of the adoption of or voting upon propositions. The qualifications of voters upon a proposition are defined in subdivision 2 of section 41. Section 223 provides that if a proposition to establish a system of water works be adopted, the board of water commissioners shall proceed to construct such system accordingly. Section 243 provides that if a proposition to establish a lighting system be adopted, the board of light commissioners shall proceed to construct such system accordingly. Section 261, "Construction of a sewer at expense of village," provides that, upon the adoption of a proposition therefor, the whole or any part of the sewer system may be constructed at the expense of the village. Adoption of a proposition by whom? Not by the sewer commissioners. The language is inapplicable to any action of the sewer commissioners. There is no provision of the statute authorizing them to adopt a proposition. They are to proceed with the construction of the sewer system upon the adoption of a proposition therefor. The board of sewer commissioners may establish and maintain a sewer system. The word "establish" is not used in

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the sense of to construct, and that is not its meaning etymologically. Before taking any proceedings for the construction of a sewer the board of sewer commissioners, "at the expense of the village, shall cause a map and plan of permanent sewer system for such village to be made." Of course, it is all to be done at the expense of the village. If to establish, gives the sewer commissioners authority to construct, it was unnecessary to add especially that the map and plan should be made at the expense of the village. This provision was necessary to enable the sewer commissioners to frame the proposition to be submitted, so that it would contain the required description of the sewer system and a statement of the estimated maximum and minimum cost thereof. The authority to incur this expense was necessarily given to the sewer commissioners. No other authority to incur the expense of any part of the sewer system is given to the sewer commissioners until the adoption of a proposition therefor in the manner provided by the statute. It is not only so plainly provided, but the provisions for the construction of water works and a lighting system show the purpose of the Legislature to permit the voters of a municipality to decide for themselves questions of this character, and determine upon the expediency of such expenditures and their extent. The purpose of the statute is not new. It is the reenactment of a law which provided for the submission of the question of the proposed improvement to the voters of the municipality. The rule for the construction of statutes does not permit the presumption that a change of purpose was intended unless the language is explicit and clear in that direction.

The contention of the plaintiff is that the trustees having full power, because of the fact that the village had no separate board of sewer commissioners to establish and maintain a sewer system for the village, were not required to submit a proposition at an election therefor, in the manner provided by the statute, but that they could determine that question and the estimated maximum and minimum cost thereof in the manner provided by the resolution alleged and set out in the complaint.

It is not claimed that the proposition submitted to the voters conformed in any manner to a proposition whether or not a sewer system should be constructed in whole or in part at the expense of the village, describing the portion of the system proposed to be so constructed, or that it contained a statement of the estimated max-

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imum and minimum cost thereof. None of these matters was contained therein. It is simply a resolution authorizing the trustees to borrow $75,000 (to be raised by tax or assessment), or so much thereof as may be necessary, upon the bonds of the village, for the purpose of constructing a permanent sewer system and sewage disposal works for the village.

The complaint alleges that the proposition was duly submitted to and adopted by a majority vote of the voters of the village qualified to vote upon a proposition. The resolution provided that the sum was to be raised by tax or assessment. The qualifications of the voters upon a proposition to raise money by tax or assessment differ from the qualifications of voters entitled to vote upon a proposition.

It is sufficient, however, that the proposition did not in any substantial respect conform to the provisions of the statute and the bonds issued in pursuance thereof are, therefore, invalid.

The principle of estoppel has no application here. All persons taking such bonds are chargeable with knowledge of the statute under which they were issued, and must see to it that its provisions are complied with; the fact that the holder purchased for value and in good faith does not preclude the village from showing that they were illegally issued. Cagwin v. Town of Hancock, 84 N. Y. 532.

Demurrer overruled.

GEORGE P. BUTLER, Plaintiff, *v.* JAMES B. DUKE, THOMAS F. RYAN et al., and THE CONSOLIDATED TOBACCO CO. and THE MORTON TRUST CO., Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Examination, before issue joined, to frame a complaint — Requisites — Refused where the plaintiff's affidavit sufficiently states a cause of action — How far conspiracy and fraud should be pleaded in deceit — Damages need not be accurately stated.

A plaintiff cannot obtain an examination of certain defendants in order to frame his complaint unless his affidavit on the motion shows that he presently has a cause of action — not necessarily a complete one — nor unless the affidavit also shows by facts and

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circumstances that an examination is material and necessary, it appearing that he has not information sufficient to frame a complaint and that the defendants have substantive information which ought to be stated therein in order to support the cause of action or procure adequate relief.

Where a stockholder of the American Tobacco Company, who had exchanged some of his common stock for the bonds of a consolidated company, alleged by his affidavit, that the defendants, directors of his company (made defendants with other corporations and directors thereof who had gone into the consolidation) had deceived him as to the value of his stock and had at his expense enriched themselves, by the exchange, to his damage in the difference between the interest paid on the bonds and the actual earning capacity of his stock, and the affidavit proceeded on the theory that he had been damaged as an individual and only as such, the court refused to allow him to examine before trial certain of his directors, holding that, as he had alleged misrepresentation with *scienter*, deception and injury, he had a sufficient basis to enable him to frame a complaint in an action for deceit and damages.

That he could not examine the said defendants as to the alleged conspiracy to defraud him by the consolidation and for the reason that in deceit a conspiracy need not be alleged in order to be proved.

That if there had been fraud the plaintiff was not entitled to "precise information" in regard to it since he could allege fraud on information and belief.

That as he need not state his damages accurately he could not examine the said defendants in order to ascertain the value of the property they had induced him to part with.

MOTION to vacate an *ex parte* order for the examination of two of the defendants to enable the plaintiff to frame his complaint.

W. Bourke Cockran, for plaintiff.

Nicoll, Anable & Lindsay, for individual defendants.

W. W. Fuller, for Consolidated Tobacco Company.

Junius Parker, for The American Tobacco Company and American Snuff Company.

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Martin S. Watts, for Continental Tobacco Company and American Cigar Company.

Samuel B. Clarke (De Lancey Nicoll, Samuel B. Clarke, Raymond D. Thurber, W. W. Fuller, and Junius Parker, of counsel), for Morton Trust Company.

CLARKE, J. An action has been commenced by the service of a summons and an order for the examination of Duke and Ryan, two of the defendants, has been granted *ex parte* for the purpose of enabling the plaintiff to frame his complaint, pursuant to article 1, title III, chapter IX of the Code of Civil Procedure. This motion is made to vacate the order, claiming that the affidavit upon which the order was issued is insufficient. The material facts stated in the plaintiff's moving affidavit, as of his knowledge, are: That the defendants Duke and Ryan are directors of the American Tobacco Company and of the Consolidated Tobacco Company, and a majority of the other individual defendants are directors of both companies. The corporate defendants are the Consolidated Tobacco Company and the Morton Trust Company. The plaintiff is a stockholder in the American Tobacco Company. The action is brought to recover the difference between the value of 100 bonds of the Consolidated Tobacco Company, for which plaintiff exchanged 1,000 shares of American Tobacco Company common stock, and the actual value of said stocks. The American Tobacco Company stock was originally acquired by the plaintiff upon a merger of the Union and American Tobacco Companies, and at that time Ryan assured the plaintiff that if the plan of merger were adopted Ryan would be elected to the board of directors of the American Tobacco Company, and would keep the plaintiff fully informed of everything affecting the property and business of the American Tobacco Company. Relying upon this assurance the plaintiff withdrew his opposition to the merger and the two companies were consolidated. Ryan was elected to the board of directors of the American Tobacco Company, and has ever since continued to serve in said capacity. For a year prior to June, 1901, the plaintiff heard nothing from Ryan, and never received any information concerning the business of the American Tobacco Company, except what was contained in the report of the treasurer as of the 31st day of December, 1900. In said report

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the directors willfully concealed from its stockholders the gross earnings and expenses of the company. The plaintiff paid little attention to the report, as he relied upon the assurance of Ryan. The Consolidated Tobacco Company was formed about 1901, ostensibly for the purposes of acquiring stocks of corporations engaged in the manufacture of tobacco. Upon the formation of the Consolidated Company a circular was issued inviting the stockholders of the American Tobacco Company to exchange their common stock for four per cent. fifty-year gold bonds of the Consolidated Company, upon the basis of $100 par value for said bonds, for each share (par value $50) of the stock. The circular was indorsed, "Issued by order of the directors," and signed by Duke, president. The plaintiff knew that the stock was earning much more than the amount necessary to pay the interest on the bonds which were proposed to be exchanged for it, and he knew that congress had passed a law by which taxation theretofore paid by the American Tobacco Company would be reduced by over forty cents per thousand cigarettes, but was unable to say whether the tobacco company would give the benefit of such reduction to the consumers or would add the sum of such reduction to its earnings, whereby revenues, applicable to dividends on common stock, would be largely increased. The plaintiff being unwilling to base his request for information upon the assurance by Ryan, sought, through his attorney, an explanation from Ryan of the offer contained in the circular of the Consolidated Tobacco Company. The correspondence is set out at length, and the plaintiff's attorney therein charges that the purpose of Duke's advertisement was to induce the stockholders of the American Tobacco Company to part with their stock for very much less than its value by deliberately concealing from them the fact that on the first of July its earning powers would be largely increased. The only reply made by the defendant Ryan states that "the entire transaction to which you refer is, so far as I am aware, fully set forth in the published advertisement," and makes a request that the names of the stockholders who desired the information be disclosed. It appears from the correspondence that the names of the stockholders were not disclosed. Upon the advice of his attorney, that if, under certain conditions the directors were enriched at his expense, the plaintiff could make them account, he deposited half his stock and took the bonds in exchange. Since the plaintiff deposited his

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stock, the defendants Ryan, Duke and others, have increased the dividend on the common stock of the American Tobacco Company from six to a present rate of ten per cent. By inducing the plaintiff to part with his stock as aforesaid, the Consolidated Tobacco Company has secured for itself all the earnings on said common stock over and above eight per cent. without paying any consideration whatever therefor. The plaintiff is ignorant of the earnings of the American Tobacco Company, the extent of its assets and the condition of its property; the defendants Ryan and Duke are fully aware thereof. It is necessary, in order to frame his complaint, to examine Ryan and Duke upon these matters so that he can ascertain the value of the property which he and other stockholders have been induced to part with in ignorance of its true value by the corrupt refusal of the defendants to give such stockholders information. The plaintiff further alleges in his affidavit, upon information and belief, "that the real purpose for which said Consolidated Tobacco Company was organized was to enable the organizers and directors thereof and the individual defendants herein to divert from the stockholders of the American Tobacco Company, including the plaintiff, to themselves a large proportion of the earnings of the said company to which the said stockholders were lawfully entitled and to acquire from the said stockholders their stock for the benefit of said directors for much less than its real value by deceiving said stockholders as to the earnings and earning capacity of said American Tobacco Company;" that the earnings of said company would justify dividends of fifteen to twenty per cent; that the Consolidated Tobacco Company is not engaged in any tobacco business, its property and assets over and above its alleged capital consisting in the difference between the price paid for the stock of the American Tobacco Company, to the holders thereof, and the real value of said stock; that the $30,000,000 asserted in the circulars signed by Duke, as subscribed to the stock of the Consolidated Tobacco Company, was obviously intended to be understood as an assertion of a guarantee for the payment of interest on the bonds and was wholly misleading and merely another feature in the scheme of fraud; that the only property pledged for the payment of said bonds is stock for which they were exchanged; that said capital, if it were actually subscribed, remains wholly in control of the subscribers, who are the directors of the Consolidated Company. That by

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means of the misleading circular and other fraudulent misrepresentations and devices the Consolidated Tobacco Company has obtained all the stock of the American Tobacco Company, except about 12,000 shares. The Consolidated Tobacco Company is substantially owned by the defendants named, and whatever value its stock has over and above par represents the measure of success which the defendants have achieved in defrauding the stockholders of the American Tobacco Company. The Consolidated Tobacco Company is but a mask for said Ryan and the other defendants herein, and is in truth and in fact the capitalization of a gigantic swindle, the profits of which the participants sought and are seeking to divide under the guise of a corporate organization. The earnings of the American Tobacco Company are concealed by the diversion thereof to the subordinate or allied companies controlled by the Consolidated Tobacco Company and the defendant Duke. For the purposes of this motion the allegations in the affidavit on which the order was granted must be assumed to be true, as the defendants move to vacate on the original papers. When application is made to examine a party before trial the affidavit must convey to the court such knowledge of the facts as to convince the court that the examination is desired solely for the purposes authorized by the Code. Matter of Bronson, 78 Hun, 351. For this reason it has uniformly been held that when a plaintiff, for the purpose of framing his complaint, obtains an order for the examination of a defendant, he must establish by affidavit the existence of a cause of action in his behalf (Muller v. Levy, 52 Hun, 123), and the examination cannot be had for the purpose of ascertaining whether or not the plaintiff has a cause of action. Pots v. Herman, 7 Misc. Rep. 4; Matter of Bryan, 3 Abb. N. C. 289; Matter of Dounce, 7 Civ. Pro. 426; Bigler v. Duryee, 73 Hun, 556; De Leon v. De Lima, 66 How. Pr. 287; Matter of Anthony & Co., 42 App. Div. 66; Matter of White, 44 id. 119; Long Island Bottlers v. Bottling Brewers, 65 id. 459. On the other hand it is uniformly held that if it appears from the affidavit that the plaintiff has sufficient information to frame a complaint he should not be permitted to examine the defendant, because it is unnecessary. Hutchinson v. Simpson, 73 App. Div. 520; Schmerber v. Reinach, 38 id. 622; Green v. Carey, 81 Hun, 496; De Lacey v. Walcott, 59 N. Y. Super. Ct. 137; Martin v. Clews, 55 id. 552.

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These decisions do not deprive the plaintiff of the privilege of examination in any event as might at first appear, but limit the examination to cases where there is compliance with the two-fold requirement, to show the existence of an actionable grievance and at the same time a lack of substantive matter required to be stated in the complaint. The affidavit of the plaintiff applying for the order need not state a complete cause of action, provided it appears that the plaintiff is entitled to some relief. Hart v. Chase, 67 App. Div. 445; Frothingham v. Broadway & Seventh Ave. R. R. Co., 9 Civ. Pro. 304. But when it appears that the plaintiff is entitled to relief, it must then further appear that he cannot formulate a complete statement of the relief sought without the aid of the examination of the defendant. A mere general averment that the testimony is material and necessary is insufficient where the affidavit on which the order was granted does not specify the facts and circumstances which show that the examination of the person is material and necessary, in conformity with rule 82 of the General Rules of Practice. Corbett v. De Comeau, 54 How. Pr. 506; Leary v. Rice, 15 App. Div. 397. In the moving affidavit before me there is no statement of facts and circumstances which shows that the examination of the defendant is necessary, but it clearly appears from the affidavit that the plaintiff has sufficient knowledge of all the facts which he claims constitute his cause of action and which, on his theory of the case, are requisite for him to allege in framing his complaint. The fact that the plaintiff has not made the American Tobacco Company a party defendant precludes the theory of an action on behalf of himself and other stockholders for the benefit of the corporation, as in such cases the corporation is a necessary party defendant. Greaves v. Gouge, 69 N. Y. 154. The plaintiff here asks redress for the wrong committed against him individually as a stockholder. The averments of mismanagement of the affairs of the American Tobacco Company are only relevant in so far as they relate to the fraud practiced upon the plaintiff as distinguished from the damage to the corporation itself resulting from such mismanagement. In Niles v. N. Y. C. & H. R. R. R. Co., 69 App. Div. 144, 148, Mr. Justice Laughlin says: "If a wrong were committed against the plaintiff as a stockholder, as contradistinguished from a wrong against the

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corporation, that would give him a right of action against the wrongdoer. Rothmiller v. Stein, 143 N. Y. 581; Cazeaux v. Mali, 25 Barb. 578; Ritchie v. McMullen, 79 Fed. Repr. 522; Walsham v. Stainton, 1 DeG., J. & S. 678." In the case presented by the moving affidavit damage to the plaintiff as an individual is shown, irrespective of losses by the whole corporation. The plaintiff alleges his ownership of stock in the American Tobacco Company; that the defendants are directors of the corporation, and that by their deception they have acquired his stock. It does not appear in his moving affidavit that the defendants were placed under obligation to communicate information as to the conditions of the company or value of the stock, because of any specific demand by the plaintiff as a stockholder for information. The demand of his attorney, without disclosing the names of the stockholders for whom he was authorized to speak must be disregarded altogether, because such a request does not impose any obligation upon the directors of a corporation to make any reply whatever. But it does appear by the averments that the defendant Ryan had agreed to furnish the plaintiff special information in consideration of his originally taking stock in the company; it also appears that the defendants undertook to issue a report of the condition of the affairs of the corporation which it is alleged willfully concealed the true condition of the affairs of the company; that they further published a circular offering to exchange for his stock bonds of a new company which he believes was formed by them for the purpose of acquiring his stock with intent to deceive the plaintiff, and that he was deceived and induced thereby to part with his stock. He states the manner of making the representations and when and how they came to his knowledge. He further states that the dividends on such stock since the defendants acquired the same have been raised by the defendants, and that they have been enriched at his expense, and that he has been damaged in an amount equal to the difference between the interest paid on the bonds and the actual earning capacity of the stock. It is not necessary that he should allege more. Misrepresentation with *scienter* on the part of the defendants and deception and injury suffered by the plaintiff are sufficiently averred to enable the plaintiff to frame a complaint demanding damages in an action for deceit. With the information which the plaintiff already has a complaint may be drawn, which, if properly denied, would raise the question whether

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the plaintiff, if the truth had been told him, would or would not have exchanged his stock for the bonds. Such a complaint was held sufficient on demurrer in Rothmiller v. Stein, 143 N. Y. 581, and in Cazeaux v. Mali, 25 Barb. 578, approved in Bruff v. Mali, 36 N. Y. 200, 206. Judge Andrews, in Brackett v. Griswold, 112 N. Y. 454, 467, says: "The principles which govern an action for fraud and deceit are the same, whether the fraud is alleged to have originated in a conspiracy, or to have been solely committed by a defendant without aid or co-operation. Whenever it becomes necessary to prove a conspiracy in order to connect the defendant with the fraud, no averment of the conspiracy need be made in the pleadings to entitle it to be proved." Hutchins v. Hutchins, 7 Hill, 104. It is, therefore, not necessary that the plaintiff examine these defendants to ascertain their part in the alleged conspiracy which is averred to have culminated in the formation of the Consolidated Tobacco Company. Neither is the examination necessary, as claimed by the plaintiff, "to procure the precise information" which he requires to frame his complaint. This is not a case where the precise information which he demands is requisite. As Mr. Justice Lawrence held in Macy v. Hastings, 2 Law Bull. 87, if it is essential that allegations as to fraud should be inserted in the complaint, the plaintiff, if he believes such frauds exist, can make such allegations upon information and belief. The plaintiff also urges that in order to frame his complaint it is necessary that he examine said Ryan and Duke so that he can ascertain the value of the property which he has been induced to part with. The amount of damages need not be accurately stated, and an examination cannot be permitted for that purpose. Balcom v. Adams, 15 Civ. Pro. 198; Hutchinson v. Simpson, 73 App. Div. 520. Whether or not the plaintiff has all the information which he may require before going to trial need not now be determined. It does not appear that the examination is material and necessary to enable the plaintiff to frame his complaint. The motion to vacate the order for such examination is, therefore, granted. Ten dollars costs.

Motion granted; ten dollars costs.

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SUSAN K. ELMES, Plaintiff, *v.* JAMES B. DUKE, THOMAS F. RYAN et al., THE AMERICAN TOBACCO CO., THE CONSOLIDATED TOBACCO CO., THE CONTINENTAL TOBACCO CO., THE AMERICAN SNUFF CO., and THE AMERICAN CIGAR CO., Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Examination, before issue joined, to frame a complaint — Minority stockholder's action against her directors for an accounting — Requisites of examination — Director's duty of disclosure.

Affidavits of a minority stockholder of the American Tobacco Company, which allege that its directors have formed and control three analogous corporations as well as a subsequent consolidated company embracing all the corporations, that the directors have made agreements with themselves to divert the business of the American Tobacco Company to the other corporations and to the consolidated company, that they have made false reports as to the condition of the American Tobacco Company, that they have withheld from it dividends earned and have made for themselves and withheld from it large profits, show facts sufficient to entitle the minority stockholder to sue in her own name for an accounting by the directors of the profits and enable her to frame a complaint, and this being so, she cannot be permitted to examine them before issue joined for the purpose of framing a complaint.

Her ignorance of the exact terms of the agreements under which the directors managed or are managing the other corporations affords no grounds for such an examination as she need not allege the agreements accurately nor more than their purport.

The extent of her damage is not a proper subject for such an examination.

To justify such an examination it should appear that the information sought is peculiarly within the knowledge of the defendants sought to be examined and is not accessible to the moving party in any other manner.

The moving party does not meet this requirement where she has not even demanded the information she here seeks.

A director of a corporation does not occupy such a fiduciary relation

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to a stockholder thereof as to require him, without compliance had with the rules governing such examinations, to disclose to her what he has done with the property of the corporation.

MOTION to vacate an order for the examination of two of the defendants to enable the plaintiff to frame her complaint.

W. Bourke Cochran, for plaintiff.

Nicoll, Anable & Lindsay, for individual defendants.

W. W. Fuller, for Consolidated Tobacco Company.

Junius Parker, for The American Tobacco Company and American Snuff Company.

Martin S. Watts (De Lancey Nicoll, Samuel B. Clarke, Raymond D. Thurber, W. W. Fuller, and Junius Parker, of counsel), for Continental Tobacco Company and American Cigar Company.

CLARKE, J. This is a motion to vacate an order for the examination of Duke and Ryan, two of the defendants, for the purpose of enabling the plaintiff to frame her complaint. The circumstances under which the motion is made are the same as in the case of Butler v. Duke, and the moving affidavits contain all the material facts alleged in the moving affidavit in that case, and also add thereto the following statement of the purpose and nature of the action and the judgment demanded herein. The plaintiff is a stockholder in the American Tobacco Company. The individual defendants are the directors of that company and the corporate defendants are the American Tobacco Company and other corporations of which they are directors. In 1899 the individual defendants organized the Continental Tobacco Company, and some of them became directors therein. In like manner the American Snuff Company and the American Cigar Company were organized by them, and they directed the affairs of all four companies. Purporting to act in the interest of the American Tobacco Company, but in reality acting in opposition thereto and in their own interests, they, as directors of the American Tobacco Company, made with themselves, as directors of the other com-

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panies, agreements diverting the business of the American Tobacco Company to the other corporations in which they were interested and thereby made and retained large profits for themselves. They neglected to declare dividends on the stock of the Continental, the cigar and snuff companies, so as to prevent the payment of profits to the American on its stock in such companies until such time as they should be the sole owners of the American Tobacco Company. They made false reports to the owners of the stock of the American and the Continental Tobacco Companies. Their conspiracy to defraud the plaintiff and other stockholders of the American Tobacco Company culminated in their acquirement of the greater proportion of its stock through the medium of the Consolidated Tobacco Company. Their organization of this company and the exchange of its bonds for stock of the American Tobacco Company are fully set forth in the statement of the allegations in the moving affidavit in Butler v. Duke (p. 235, *supra*). It appears, however, in this case that the plaintiff did not part with her stock. The affairs of the American Company are alleged in the moving affidavit to have been managed by the defendants in the interest of the Consolidated and for the personal profit of the individual defendants by diversion of the assets of the American to the Consolidated, using the American as an instrument for the expansion of the business of the Consolidated, and imposing liabilities and contracts upon the American which were not advantageous to it, but for the benefit of the Consolidated, or its subsidiary companies. As soon as the greater portion of the American and Continental stock was acquired by the defendants, they issued statements showing an increase of 100 per cent in the earnings of the companies, which increase resulted solely from sources which the directors had concealed from the stockholders. The affidavit further alleges: "The action has been instituted to compel the defendants, the Consolidated Tobacco Company and the directors of the American Tobacco Company to account for all profits which they have made by the fraudulent conspiracy herein described, and to pay such profits into the treasury of the said American Tobacco Company, for the benefit of the plaintiff and the other stockholders therein." She also seeks to set aside all the agreements made with the Consolidated Tobacco Company and its subsidiary companies in hostility to the interest of the American Tobacco Company. In this affidavit the nature of the action and the substance of the judg-

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ment demanded are stated, and it appears on the face of the papers that the plaintiff is entitled to some relief. The action is brought by a minority stockholder to compel an accounting by the directors to the corporation. It is held that "Where the corporation is exclusively under the control of the trustees and officers whose acts and management are questioned a demand that the corporation bring the action would be idle and fruitless and in such cases equity permits the stockholder to bring the action in his own name." Sage v. Culver, 147 N. Y. 241, citing Brinckerhoff v. Bostwick, 88 id. 52; Hawes v. Oakland, 104 U. S. 450; Leslie v. Lorillard, 110 N. Y. 519. So also Flynn v. Brooklyn City R. R. Co., 158 N. Y. 493; Niles v. N. Y. C. & H. R. R. R. Co., 69 App. Div. 144. But the order for the examination must be vacated because the plaintiff fails to show that the examination is material and necessary, as required by section 872, subd. 4 of the Code of Civil Procedure, and rule 82 of the General Rules of Practice. Although the plaintiff's theory of action differs in this case from Butler v. Duke, it is equally clear here that she has sufficient knowledge of all the facts which need be alleged in her complaint. The Court of Appeals in Sage v. Culver, 147 N. Y. 241, held that a complaint in an action for an accounting brought by a stockholder was not demurrable where it appeared in substance that the officers and trustees of the defendant corporation took from themselves, as trustees and officers of another corporation, a lease at an exorbitant rent, which arrangement had the effect of unlawfully depleting the funds of the corporation and injuring the plaintiffs as stockholders. It was also held in that case that a complaint was not demurrable where it averred in substance that the defendants, as officers and trustees of the defendant corporation, have taken from its treasury large sums of money and paid the same to themselves as individuals on account of alleged loans made by them to the corporation, concealing the origin and nature of the debt from the plaintiffs and making false statements in regard to the same. Judge O'Brien said: "When it can fully be gathered from all the allegations of a complaint that the officers and directors of a corporation have made use of relations of trust and confidence in order to secure or promote selfish interest, enough is then averred to set a court of equity in motion and to require an answer from the defendants in regard to the facts." In Hutchinson v. Simpson, 73 App. Div. 520, a recent case in many

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respects similar to this, Mr. Justice Laughlin said: "They (the plaintiffs) are in a position, therefore, to frame a complaint in equity for an accounting. They are not required to allege with definiteness or certainty what the accounting will show. So far as the requirements of the Code and practice in that regard are concerned, it will be sufficient to allege that the appellants have received to their own use and benefit some of the stock which it was their duty to return to the corporation. The rule still obtains that an examination may not be had before issue joined, unless it be satisfactorily shown that it is necessary to enable the plaintiff to frame his complaint. (St. John v. Buckley, 39 App. Div. 629; Merritt v. Williamson, 27 id. 121; Clark v. Ennis, 65 id. 164, 612; Kessler v. Levy & Levis Co., 7 id. 142; Bloodgood v. Slayback, 54 id. 634.)" The moving affidavit alleges three reasons to show the necessity of an examination of some of the defendants to enable the plaintiff to frame a complaint in this action. 1. The plaintiff is ignorant of the exact terms of the agreements and arrangements under which the directors have managed the affairs of the American Tobacco Company, in conjunction with those of the Continental, the American Snuff and the American Cigar Companies, and the terms of the agreement under which the Consolidated Tobacco Company was organized by Duke and his associates. 2. The plaintiff has no knowledge whether or not property of the American Tobacco Company has been diverted into the hands of persons other than those mentioned, and the extent to which it has been diverted into the hands of the other defendants. 3. The plaintiff is ignorant of the real gross and net earnings and the amounts charged to expense of the several defendant companies, the exact condition of the American Tobacco Company and the precise extent of the excess of the earnings of said company over the dividends paid. None of these reasons are sufficient. The information sought is not material and necessary to a complete statement of plaintiff's cause of action. The exact terms of the agreements need not be alleged in the complaint. The moving affidavit alleges the purport of them and the results thereby caused. The second and third reasons relate solely to the measure of damages. The extent of the damage is not properly the subject of an examination to enable the plaintiff to frame a complaint. Mr. Justice Laughlin, in Hutchinson v. Simpson, at page 523, said: "Moreover, the information which the respondents seek to obtain

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by the examination does not relate to any of the material facts required to be alleged in their complaint. It relates to the question of damages only, which would be determined on an accounting." The affidavit is also defective because it does not appear that the information desired is peculiarly within the knowledge of the defendants whose examination is sought, and not accessible to the plaintiff. Pots v. Herman, 7 Misc. Rep. 4; 27 N. Y. Supp. 330; De Lacy v. Walcott, 13 N. Y. Supp. 800. In Hutchinson v. Lawrence, 29 Hun, 450, where an examination was ordered, the court said: "The certainty in the allegations which would be required to be made for the purpose of sustaining the action, if that can be done at all, can, under the circumstances, be obtained in no other manner." The plaintiff has not even demanded the information which she seeks of these defendants. In the correspondence set out in the moving papers her attorney made certain requests in the interests of stockholders, but as he did not disclose their names, the defendants were not under obligation to reply and the situation presented by the moving papers is the same as if no demand had been made. The situation is the same as in Nathan v. Whitehill, 67 Hun, 398, in which Van Brunt, P. J., says: "It further appears that the company in which the plaintiff was a stockholder kept books of account, which are within the reach of the plaintiff, and it does not appear that the plaintiff has made any attempt whatever to procure an inspection of these books, or that access to them has been denied. Therefore, when the plaintiff states that he is unable to procure the information in regard to the transactions of the company in any other way than by this examination, it does not appear that he has exhausted the ordinary avenues of information; and it seems to us that, until this has been done, the plaintiff is not entitled to the extraordinary relief demanded in proceedings of this nature." Sherman v. Beacon Construction Co., 58 Hun, 143. The plaintiff contends that, as the defendants are directors of the corporation in which she is a stockholder, that the technical rules which govern the granting of orders for the examination of parties should be relaxed, it being the duty of a director defendant in such case to make a full disclosure of what he has done. Rosenbaum v. Rice, 36 Misc. Rep. 410, is cited in support of this contention. A rule which was there relaxed is that the order for the examination of a party will be vacated where it

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appears that the allegations in the moving affidavit necessary to establish the cause of action are upon information and belief, without disclosure of the sources of the information and grounds of belief. Jiminez v. Ward, 21 App. Div. 387. It has not been considered necessary on this motion to insist upon this rule, and the allegations are held not only sufficient to show a cause of action, but also to disclose that plaintiff has all the information requisite to draw a complaint. In Rosenbaum v. Rice the plaintiff had applied to the president and others, without success, for information which he needed to prove his cause. The case is clearly distinguished by the fact that the examination there sought was, after issue, joined to enable the plaintiff to prepare for trial. In such case the pleadings are before the court, disclosing more fully the merits of the controversy. To meet the issues the plaintiff may need to examine and sift many papers and inquire into many negotiations to deduce the proof requisite to a clear presentation at the trial, and such examination would greatly confuse and delay the trial if done in open court. For these reasons greater latitude is permissible in issuing the order for examination in preparation for trial than where the examination is sought to enable the plaintiff to frame his complaint, which may be stated to be alleged on information and belief. Clark v. Ennis, 65 App. Div. 164. So also in Carter v. Good, 57 Hun, 116; Talbot v. Doran & Wright Co., 16 Daly, 174; Miller v. Kent, 59 How. Pr. 321; Whitman v. Keiley, 58 App. Div. 92, the examination permitted was after issue joined and in preparation for trial.

Those cases are further distinguished by the fact that they were cases of agency. The duty of an agent to disclose to his principal all the transactions in regard to the property intrusted to his care is obvious. In Whitman v Keiley, 58 App. Div. 92, Mr. Justice McLaughlin, at page 96, said: "This rule is a salutary one. No good reason can be suggested that, where one party acts as an agent of another in the management of his property, why, when called upon by his principal, he should not make the fullest disclosure of what he has done with that property." A director is not under the same obligation to disclose to a stockholder the details of the corporate management, for the interests of the individual stockholder may properly be adverse to those of the corporation. Although a director undoubtedly holds a position of trust and con-

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fidence, and owes to all the stockholders the duty of properly managing the affairs of the corporation, such director is not the agent of the stockholder, but rather the agent of the corporation. It may be that a greater degree of publicity should be given to corporate management than the present laws afford, but, under the existing laws, before an obligation to disclose the affairs of the company to the individual stockholder can arise, a demand and proper reason must be shown. The mere fact that the defendants, as directors, stand in a fiduciary relation to the plaintiff does not require that they submit to an examination to enable the plaintiff to frame a complaint against them, when the moving affidavit discloses that the plaintiff already has information sufficient to draw the complaint without the examination.

The motion to vacate the order is granted; ten dollars costs.

Motion granted; ten dollars costs.

ROSA SCHUCK, as Administratrix, Etc., of GEORGE SCHUCK, Deceased, Plaintiff, *v.* THOMAS F. MAIN and WILLIAM V. V. POWERS, JOHN MCKESSON, WILLIAM H. WICKHAM, GEORGE MCKESSON and HERBERT R. ROBBINS, Composing the Firm of MCKESSON & ROBBINS, ANDREW B. ROGERS and RUNYON PYATT, Composing the Firm of ROGERS & PYATT, Defendants.

(Supreme Court, New York Trial Term, November, 1902.)

Nuisance — Action for a death from an explosion of chemicals resulting from a fire — Proximate cause where there are several independent defendants.

Where an administratrix sues in one action two independent firms for causing the death of her intestate as alleged by the maintenance of a nuisance consisting in the storage in a city of chlorate of potash, sulphur, nitrates of strontia and barium, which a fire exploded, and the proof on the trial is that the two firms and another firm not made a party to the action were occupants of a seven-story building, that they stored their property on various floors not indicated separately as to each firm by the proof, that all stored chlorate of potash — a substance which the jury might have found to be an "explosive compound" and forbidden by the charter to be stored within the city except under certain restrictions as to place and quantity — that a fire occurred in the building and that a quarter

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of an hour later there were three successive explosions, she cannot recover at all, whether or not the storage was unlawful, where she makes no proof as to the order, in time, in which the goods of the several firms exploded, nor any proof that the goods of either of the defendant firms were the proximate cause of or contributed to the death of her intestate, or how he came to his death.

MOTION to dismiss complaint.

Jacob Friedman (Robert A. Stewart, of counsel), for plaintiff.

Agar, Ely & Fulton (Alfred Ely and Louis M. Fulton, of counsel), for defendant Main.

Latson & Bonynge (Almet R. Latson, of counsel), for defendants Rogers and Pyatt.

Thomas N. Cuthbert (Almet R. Latson, of counsel), for defendants McKesson and Robbins.

FREEDMAN, J. I have carefully considered the several points made on the motion to dismiss, and upon them have come to the following conclusions:

The plaintiff claims that the action is brought for the maintenance of a nuisance causing the death of plaintiff's intestate, and not for negligence.

There was a fire which, after the lapse of some fifteen, twenty, or twenty-five minutes, was followed by three explosions. The nuisance complained of consists in the storage of the aritcles which the fire caused to explode, the articles complained of consisting of chlorate of potash, sulphur, nitrates of strontia, and barium. They are commercial articles, and none of them is shown to contain within itself such a well-known explosive character as is contained in powder, nitro-glycerine, gunpowder, etc. The doctrine of the Powder-houses Cases, therefore, does not apply.

I am also of the opinion that the common law applicable to the maintenance of a nuisance is available to the plaintiff only so far as it has been reinforced in this State by the fire laws of this city. The storage of combustibles and explosive articles in this city is regulated by the charter of Greater New York, which prohibits certain things directly, and forbids others unless a permit is ob-

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tained from the fire department. The provisions of the charter upon this point are police regulations in prevention of a nuisance. Now, the only provisions of the charter applicable to the case at bar are contained in section 764, and they are to the effect, first, that no explosive compounds shall be stored or kept for sale in the city, except at such places, in such manner, and in such quantities as shall be determined by the fire commissioner in the exercise of his discretion, under a permit by him granted therefor, subject to be revoked at any time by said commissioner; and secondly, that no greater quantity of sulphur shall be stored or kept in or upon any one building within the city than 1,000 pounds, except the same shall be stored and kept in such building and manner as said commissioner may require under a special permit by him issued therefor. Now, the defendants, McKesson & Robbins, are chargeable upon their admissions contained in their proofs of loss, with having had in storage in the building in question 3,920 pounds of chlorate of potash, 52,394 pounds of sulphur, 21,234 pounds of nitrate of strontia, and 6,600 pounds of nitrate of barium. But this admission was not followed up by the testimony of a witness sworn upon this trial, and, therefore, is not evidence against the other defendants. So the defendants constituting the firm of Rogers & Pyatt are chargeable upon their admissions contained in their proofs of loss with having had on storage in the building in question 72,128 pounds of chlorate of potash, but as this admission was not followed up by the testimony of a witness sworn upon this trial it is not evidence against the other defendants. The consequence is that as to the defendant Main, there is no evidence that McKesson & Robbins or Rogers & Pyatt had anything on storage, nor is he shown to have had actual knowledge or notice of the storage of combustibles or explosives by any other merchant or firm. On the contrary, the evidence produced by the plaintiff and by witnesses whom the plaintiff introduced as entitled to belief throughout, is that he had nothing to do with the storage department of Tarrant & Company, though he was president of the corporation. There is not sufficient evidence to connect him individually with participation in the maintenance of a nuisance. If the action were for negligence, a different case would be presented. So, if the action were against the corporation, a different case would be presented. But the corporation that controlled the building and did the storage business

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therein was not made a party to this action. As against the defendant Main, therefore, the complaint must be dismissed. As against the defendants constituting the firms of McKesson & Robbins and Rogers & Pyatt the case is different. Neither firm knew what the other had done, and, therefore, is not responsible for the acts of the other. Each firm had on storage a large quantity of chlorate of potash. As to that article, at least, the state of the evidence is of such a character as to present a question of fact to be determined by the jury, namely, was it an explosive compound within the meaning of that term as used in section 764. If it was such an explosive compound, its storage contrary to the fire laws was unlawful. The permit shown by the plaintiff to have been possessed by the corporation of Tarrant & Company did not authorize its storage. For the reasons already stated, it is not necessary to say anything at present concerning the other articles stored by the defendants. If, therefore, there were no defect elsewhere the case would have to go to the jury. But in order to recover, the plaintiff must establish as part of her case that the deceased met his death by reason of an explosion of the goods of the defendant sought to be held liable. There is not a particle of evidence in this case as to where, on any of the seven stories of the building, the goods of the two firms were stored, but there is evidence that at least another firm had equally explosive goods there. There is not a particle of evidence as to which goods exploded first. If the goods of the third firm, not a party to this action, exploded first and killed the deceased, the defendants now here would not be liable, except upon proof that their goods contributed to his death. So, if the goods of one of the defendant firms exploded and killed the deceased before the goods of the other exploded, the other would not be held liable. So, if the deceased was killed in some other way than by an explosion, the defendants now here would not be liable. The result of all this is that upon the point that the proximate cause of the death of the deceased must be shown to have been an explosion to which the particular goods of the defendants now here contributed, there is a vital defect of proof, which under the authorities is ground for a dismissal. The complaint must, therefore, be dismissed.

Complaint dismissed.

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JOHN B. LAZZARI et al., Plaintiffs, *v.* JAMES B. HAVENS, Defendant.

(Supreme Court, New York Special Term, November, 1902.)

Mechanic's lien — Indulgence in the time of payment — Filing a lien for a monument — Effect of debtor's bankruptcy prior to filing.

A letter, written on Feb. 16, 1901, by creditors to a debtor in straightened circumstances in regard to a debt for a monument placed by them in a cemetery under a contract with him completed and payable as to the price on Nov. 1, 1900, in which the creditors say that they are willing to meet the debtor half way in the matter of the debt, that, if the latter is willing to pay interest from Nov. 1, 1900, and the principal with interest as soon as possible, the creditors will be willing to wait a reasonable time for the debtor to get his affairs straightened out, does not extend the time of the payment of the debt beyond Nov. 1, 1900, where the debtor accepts the proposition.

Therefore, where the creditors do not file their lien, for the price of the monument remaining unpaid, under L. 1898, ch. 413, § 40, until more than a year after Nov. 1, 1900, nor until Dec. 6, 1901, the lien is void under section 41 of said statute.

Where the debtor is adjudged a bankrupt on Nov. 22, 1901, the lien filed Dec. 6, 1901, entitles the creditors to no greater rights in his estate as a bankrupt than those of an unsecured creditor.

ACTION to foreclose a mechanic's lien.

Cantor, Adams & McIntyre (Edward Jacobs, of counsel), for plaintiffs.

Whitfield Terriberry, for defendant.

GILDERSLEEVE, J. On January 3, 1900, the parties to this action entered into a contract in writing, by which plaintiffs were to make a monument to be placed in Woodlawn Cemetery, for which defendant was to pay plaintiffs the sum of $1,550 "upon the completion of the contract." The complaint alleges that the contract was completed by plaintiffs on September 4, 1900, but

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the parties appear to agree that it was not entirely completed until November 1, 1900, and that the sum of $1,550 became due on that day, under the terms of the contract. The defendant, however, was apparently in straightened circumstances, and failed to pay any portion of the said sum.

Plaintiffs do not seem to have pressed the matter until about February 16, 1901, on which day they wrote a letter to the defendant, in which they made the following offer, viz.: "We (the plaintiffs) are willing to meet you half way in the matter (of defendant's said indebtedness), and if you will send us a statement that you are willing to pay interest on your bill from November 1, 1900, and to pay the amount of the bill as soon as possible, with the interest, we should like to have you, and will be willing to wait a reasonable time for you to get your affairs straightened out."

To this letter defendant replied, on February 18, 1901, as follows: "I accept your proposition, and wish to say that I am willing to pay interest from November 1, 1900, on the bill I owe you, and will pay it and the principal as soon as I can, which I hope will not be long."

Nothing, however, has ever been paid, either on the principal or as interest. On November 15, 1901, the defendant filed a petition in bankruptcy, and on November 22, 1901, was adjudged a bankrupt. The claim herein of the plaintiffs was duly proved in the bankruptcy proceeding. On December 6, 1901, about two weeks after the defendant had been adjudged a bankrupt, plaintiffs filed a notice of lien against the monument, and brought this action to recover $1,550, with interest from November 1, 1900, and for the foreclosure of the lien and the sale of the monument.

The defense is based on the bankruptcy proceeding and upon the claim that the lien was void because it was not filed within the statutory time.

The plaintiffs' claim was at first listed in the bankruptcy proceeding as an unsecured one, but afterwards, when the lien had been filed, an order was made, withholding any dividend coming to plaintiffs in the bankruptcy proceedings until the determination of the case at bar, as, under section 57, subdivision e, of the Bankruptcy Law, secured creditors' claims are only allowed "for such sums as to the court seem to be owing over and above the value of their security," and the value of the plaintiffs' security, should

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the lien be upheld, could only be determined after the foreclosure of the lien and the sale of the monument.

The Lien Law (Laws of 1897, chap. 418, § 41) provides that "such notice of lien may be filed at any time after the completion of the work, but must be filed within one year after the agreed price for finishing or placing such monument, gravestone, or other structure, becomes due." As we have seen, the price, under the contract of January 3, 1900, became due "upon the completion of the contract," which occurred on November 1, 1900; while the notice of lien was not filed until December 6, 1901, more than one year later. The plaintiffs, however, claim that the letters of February 16, 1901, and February 18, 1901, above quoted, operated to extend the time, when the price became due, from November 1, 1900, to some "reasonable time" later than February 16, 1901. It is claimed that these letters constituted a new contract, whereby, in consideration of the payment of interest from November 1, 1900, the time of payment was extended beyond February 16, 1901, so that one year from the time when the price became due had not expired when the notice of lien was filed on December 6, 1901. In opposition to this contention the defendant urges that the consent to wait a "reasonable time," contained in the letter of February 16, 1901, was a mere indulgence, and was not a valid contract extending the time of payment, for the reason that no good consideration appears to have been given for such extension, as the promise to pay interest on the claim was not a valid consideration. It is true that interest is recoverable on contracts for the payment of money from the time when the principal ought to have been paid. Williams v. Sherman, 7 Wend. 109. The defendant, therefore, urges that plaintiffs were entitled to interest from November 1, 1900, irrespective of any agreement on the part of defendant, contained in his letter of February 18, 1901, to pay the same. The defendant points out that the agreed price had been due for more than three months when these letters were written. The parties, however, were at liberty to make a supplemental arrangement to extend the time of payment. In the case of Veerhoff v. Miller, 30 App. Div. 355, it was held that "Mutual promises for the extension of the time of payment of a mortgage constitute a sufficient consideration for a contract to that effect, or, if insufficient, create an estoppel, which is available to a party misled thereby to his prejudice." The plaintiffs claim that the

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same principle applies here, and that the letter of February sixteenth certainly operated to give to the defendant further time in which to pay the agreed price, which had become due on November 1, 1900; and that as defendant got the benefit of this extension he can hardly be entitled afterward to raise the point that the plaintiffs received no consideration for their indulgence to him. It is undoubtedly a general principle that he, who permits a thing to be done, shall not avail himself of any benefits arising from a nonperformance which has been occasioned by his own act. Upon this principle has arisen the doctrine of waiver and estoppel. Veerhoff v. Miller, 30 App. Div. 357. Plaintiffs point out that, instead of giving the extension of February 16, 1901, they could have filed their notice of lien then, which would have been well within the statutory time, as only a little more than three months had elapsed since the agreed price had become due under the contract of January 3, 1900. Plaintiffs, therefore, contend that the defendant should not be allowed to avail himself of the benefit arising from the nonperformance by the plaintiffs of the act, *i. e.*, the filing of the notice of lien, which would have secured their claim, since such nonperformance was occasioned by defendant's own act in promising to pay the principal and interest as soon as he could, which he hoped would not be long. Veerhoff v. Miller, *supra*.

But did the letter of February sixteenth extend the time when "the price became due," under the contract of January 3, 1900? A careful examination of the wording of the letter would seem to suggest a different construction. As the defendant was in straightened circumstances, the plaintiffs seem to have simply indicated that they would not then press their claim, but would allow the defendant "a reasonable time" in which to straighten out his affairs; while at the same time they particularly stipulated, by the interest clause, that the date when the price became due was November 1, 1900, not February 16, 1901, nor any "reasonable time" thereafter.

The wording of the statute is clear and positive, and it requires the filing of the notice of lien "within one year after the agreed price became due." Adler v. Lumley, 46 App. Div. 230.

I am of opinion, therefore, that the agreed price became due on November 1, 1900, and plaintiffs' statement in the letter of February 16, 1901, that they were "willing to wait a reasonable time"

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for defendant "to get his affairs straightened out," while stipulating for the payment of interest from November 1, 1900, did not operate to alter the original contract of January 3, 1900, by fixing a different date as the time when the agreed price became due. The plaintiffs should have filed their notice of lien within one year from November 1, 1900. As they did not do so, the lien is void.

But were the defense based upon the defect in the time of filing the lien not well founded, the defense of bankruptcy would be a sufficient bar to plaintiffs' recovery. The plaintiffs urge that the filing of the lien changed plaintiffs from unsecured to secured creditors. In the case at bar, as we have seen, the notice of lien was not filed until some three weeks after the filing of the petition in bankruptcy.

In Collier's American Bankruptcy Reports (vol. 2, p. 219, note), we find the following language, viz.: "The questions which in bankruptcy frequently arise in connection with claims of lienors under mechanics' lien laws relate not to the rights of lienors to enforce liens whose existence is admitted, but go to the existence of the lien in particular cases. If the lien is a perfected one, then it is conceded by all the authorities that it is not impaired by the bankruptcy of the person upon whose property it exists. If the lien exists, and some further proceeding must be taken for the purpose of preserving it, such proceeding may be taken by the lienor after the bankruptcy, as well as before; and the Bankruptcy Court will then protect the rights of the lienor. But if there is no lien existing at the time of filing the petition, although there may have then existed a right to acquire a lien, there is no valid lien which can be asserted against the trustee."

A large number of federal decisions are cited in support of the doctrine thus laid down.

In the case at bar, at the time of the filing of the petition in bankruptcy, no lien was existing.

The statute (Laws of 1897, chap. 418, § 40) provides that "A person furnishing or placing in a cemetery or burial ground, a monument, gravestone, inclosure or other structure, has a lien thereon for the agreed price thereof or the part remaining unpaid, with interest from the time the amount was due, upon filing with the superintendent or person in charge of such cemetery or burial ground, a notice of lien as provided in this article."

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The lien, therefore, only commences to exist upon the filing of the notice, which was not done by plaintiffs until some three weeks after the filing of the petition in bankruptcy and some fourteen days after defendant had been adjudged a bankrupt.

In the case of Goldman v. Smith, 2 Am. Bank Rep. 107, the United States District Court approved the doctrine that "if the lien is not perfected when proceedings in bankruptcy are commenced, the creditor is prevented from obtaining it," citing Morgan v. Campbell, 22 Wall. 381.

In the case of Kerby-Dennis Co., 2 Am. Bank Rep. 402, the United States Circuit Court held that it seemed to be the design of Congress, in the Bankruptcy Act, "to protect all liens, whether arising by contract or statute, and only to avoid those which are in fraud of the act, and those which have been secured by and arise from legal proceedings within the limited time specified before bankruptcy," *i. e.*, four months before the filing of the petition in bankruptcy. But it was there held that a mechanic's lien, obtained within four months prior to the filing of the petition, if perfected according to the provisions of the statute, is a valid and subsisting lien under the Bankruptcy Act, and is not a lien obtained by or pursuant to legal proceedings, but is a creature of statute. Such liens, however, the court held, cannot be recognized and enforced in bankruptcy, if the lienors have not complied with all the statutory provisions for perfecting them.

There is nothing in this decision to support the conclusion that a lien, which has not been obtained until three weeks after the filing of the petition in bankruptcy and two weeks after the debtor has been adjudged a bankrupt is a valid and subsisting one.

The plaintiffs are not entitled to a foreclosure of the lien, but will have to take their share, like other unsecured creditors of defendant, in the dividends declared in the bankruptcy proceedings. The complaint is dismissed, but, under the circumstances, without costs.

Complaint dismissed, without costs.

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AUGUSTUS H. SKILLEN, as Trustee in Bankruptcy of the Estate of ABRAHAM ENDELMAN, Plaintiff, *v.* ABRAHAM ENDELMAN, HARRY TIGER, DAVIS COOPER and REBECCA COHEN (the Name Rebecca being Fictitious, Defendant's Real First Name Being Unknown to Plaintiff), Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Bankruptcy Law of 1898 — Trustee's action to set aside a bankrupt's chattel mortgage and his transfers — When the mortgagee is not a bona fide holder under section 70e — Transfers more than four months old when voidable — When a fraudulent transferee is not a necessary party.

A mortgagee, who knows that the mortgagor is selling the mortgaged chattels for his own use and who consents to his doing so, is not a *bona fide* holder of the mortgage within the meaning of the Bankruptcy Law of 1898, section 70e, and therefore the mortgagor's trustee in bankruptcy may under said section have the mortgage set aside as fraudulent and void as to other creditors.

Where the owner of personalty remains in possession or control of it at all times and until his bankruptcy, transfers, unexplained by the transferees, which he alleges he made five months before bankruptcy, must, under the Personal Property Law (L. 1897, ch. 417, § 25), be deemed conclusively fraudulent and the trustee of the bankrupt may avoid them and recover the property or its value.

A fraudulent transferee who has transferred to another fraudulent transferee all the property rights which she received under her transfer is not a necessary party to the trustee's action.

ACTION to set aside a chattel mortgage and certain transfers of personal property.

T. T. Baylor, for plaintiff.

Abraham B. Schleimer, for defendants.

GILDERSLEEVE, J. The action is brought by the trustee in bankruptcy of the defendant Endelman to set aside (1) a chattel mortgage on certain personal property, situated in the place of business of the said Endelman, which mortgage was made by said Endel-

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man in favor of the defendant Cooper, and was dated and executed on July 10, 1901, but was not filed until November 13, 1901; and (2) two transfers of the same property, one of which is alleged to have been made by said Endelman to the defendant Mrs. Cohen, and the other of which is alleged to have been made by Mrs. Cohen to the defendant Tiger. In both cases, the property is alleged to have been transferred, subject to the said mortgage, made by Endelman in favor of Cooper, and both of these transfers are claimed to have been made in July, 1901. The property, however, remained in the possession and under the control of the said Endelman, up to the time of his filing a petition in bankruptcy, in the latter part of December, 1901.

Previous to the filing of the mortgage the claims of many of the unpaid creditors of Endelman matured and some of these claims have been put into judgment. One, at least, of the creditors obtained judgment before the date of the filing of the said chattel mortgage.

Chapter 248 of the Laws of 1900 provides as follows, viz.: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, * * * which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article."

Conceding that the creditors of Endelman could have maintained an action to have the said mortgage declared void as to them, does it follow that the trustee in bankruptcy of said Endelman can maintain this action to set aside the mortgage for the benefit of the estate of which he is trustee?

Section 70, subdivision e, of the Bankruptcy Act provides that "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value." Under the Bankruptcy Act, the word "transfer" includes mortgages. § 1, subd. 25.

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From the wording of the above statutes, it would seem that, although the creditor might have maintained the action irrespective of any fraud, the trustee can only maintain the action against a fraudulent holder.

However, aside from the question raised by the neglect to file the mortgage until long after its execution, the plaintiff's counsel points out that the mortgage was illegal and void for another reason. The mortgage shows that it was given in part on stock on hand, *i. e.*, "all stock and lumber contained in the above-mentioned place," while the cross-examination of Cooper shows that he knew this, and was aware of the fact that the stock was being sold out, and that Endelman received the money, but did not give it to Cooper, and that Cooper did not demand such money and consented to the said actions of Endelman.

Where there is an agreement or understanding between the parties, at the time of the execution of a chattel mortgage, that the mortgagor may sell or dispose of the mortgaged property, or any portion thereof, for his own use, the mortgage is void as to the creditors of the mortgagor; and this agreement or understanding may be proved by parole, or may be inferred from the fact that the mortgagee permits the sale to be made. See Hangen v. Hachemeister, 114 N. Y. 566. Such an agreement or understanding constitutes a fraud in law as against the creditors of the mortgagor. See Southard v. Benner, 72 N. Y. 424. A mortgage of chattels, which is fraudulent and void as to a part of the chattels covered by it, is void as to the whole. See Russell v. Winne, 37 N. Y. 591. Thus the plaintiff claims, we have the question of fraud raised, and the defendant Cooper cannot be held to be a *bona fide* holder.

Moreover, section 67a of the Bankruptcy Law provides that "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate." And the same section, in subdivision b, provides that "Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

Although Cooper swore that his transactions with Endelman

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were *bona fide,* and produced checks to show the sums of money that he had paid to said Endelman, he admitted that he was a professional money lender and took notes from Endelman, and acknowledged, as we have seen, that he knew of Endelman's sales of the mortgaged property and consented to the same. In view of these facts and of the authorities above quoted, I am of the opinion that Cooper must be held not to be "a *bona fide* holder," within the meaning of section 70e, of the Bankruptcy Act, above quoted, and that the plaintiff, as trustee, may maintain the action to set aside the chattel mortgage, as fraudulent and void, and is entitled to judgment as against the defendant Cooper, setting aside the said chattel mortgage from Endelman to Cooper.

So far as the transfers from Endelman to Cohen, and from Cohen to Tiger, are concerned, a different and less intricate aspect is presented. As we have seen, the transfers were alleged to have been made in July, 1901, but Endelman retained possession and control of the property until he went into bankruptcy in December, 1901. Section 25 of the Personal Property Law (Laws of 1897, chap. 417), provides that "Every sale of goods and chattels in the possession or under the control of the vendor, * * * unless accompanied by an immediate delivery, followed by actual and continued change of possession, is presumed to be fraudulent and void as against all persons who are creditors of the vendor or person making the sale or assignment, including all persons who are his creditors at any time while such goods or chattels remain in his possession or under his control or subsequent purchasers of such goods and chattels in good faith; and is conclusive evidence of such fraud, unless it appear, on the part of the person claiming, under the sale or assignment, that it was made in good faith, and without intent to defraud such creditors or purchasers."

As we have seen, section 70e of the Bankruptcy Act clearly allows the trustee to maintain the action, to avoid a transfer, against one who is not a holder in good faith, and the trustee is not confined to transfers made within the four months antedating bankruptcy in cases of fraud. See Collier on Bankruptcy, 464; Matter of Gray, 47 App. Div. 554.

On the trial, neither Endelman nor Cohen nor Tiger were called as witnesses, and no evidence was offered to meet the presumption of fraud created by the statute. It, therefore, follows, under the provisions of the statute, that the lack of delivery and of change

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of possession of the property became "conclusive evidence of the fraud."

The defendant raises the point that Mrs. Cohen was not served with process, and that the action cannot be determined without her. The plaintiff claims that she never existed. However this may be, I do not think that she was a necessary party to the action. Whatever title she got from Endelman, she transmitted the same to Tiger. There is no pretense that she retained any of the property, inasmuch as none of the property left the possession and control of Endelman himself, so far as either Cohen or Tiger is concerned. Both the fraudulent vendor, Endelman, and the fraudulent vendee, Tiger, have been served with process and have appeared in the action, although they took no part at the trial. There is no pretense that Mrs. Cohen in any way incumbered the property, or exercised any rights whatever over the same. A fraudulent grantee or transferee, after he has conveyed or transferred all the property to another fraudulent grantee or transferee, is not a necessary party, although it is not improper to join him, but his grantee or transferee is a necessary party. See 5 Ency. Pl. & Pr. 543, and cases there cited.

The plaintiff is entitled to judgment setting aside the transfers and chattel mortgage.

Judgment for plaintiff, setting aside transfers and chattel mortgage.

MARY E. LE VIE, Plaintiff, *v.* JOHN T. FENLON and JAMES BRYAN, as Executors, Etc., of MARY CROCHERON, Deceased, JAMES BRYAN, Individually, ANNA BRYAN and MATTHEW TIERNEY, Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Specific performance — Of a contract to make a gift to one for being cared for during life — The defense of an adequate remedy at law must be pleaded.

Where a woman, since deceased, comes to the home of a dressmaker and promises her that if she will give up dressmaking, stay at home and take care of the woman, as maid and companion, for the rest of the woman's life, she will give her certain shares of stock, the dress-

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maker, upon performing, is entitled to specific performance of the contract as against executors of the woman who refuse to surrender the shares of stock to the dressmaker.

Where they have not pleaded that she has an adequate remedy at law she will be given the foregoing equitable relief and will not be compelled to sue them as for a conversion of the stock or upon a *quantum meruit* for the value of her services.

ACTION brought for specific performance of a contract.

Rufus I. Weaver, for plaintiff.

John V. Judge, for defendants.

GILDERSLEEVE, J. The action is brought in equity for a specific performance of a contract, alleged to have been made by one Mary Crocheron, now deceased, with plaintiff, by which plaintiff was to have ten shares of eight per cent. preferred stock of the Cook & Bernheimer Company, then belonging to said Crocheron, upon the death of said Crocheron, provided plaintiff took care of said Crocheron until her death. The complaint asks that the defendant-executors be compelled to assign and deliver a certificate of ten shares of said stock to the plaintiff and that the defendants and all persons claiming under them be barred from any and all title, claim or interest in the said ten shares of stock. The answer denies the alleged agreement, and alleges that plaintiff has been fully paid for any services that she may have rendered to the deceased.

Upon the trial, the plaintiff established, by a fair preponderance of proof, the following state of facts, viz.: Mary Crocheron, now deceased, came to plaintiff's home on or about March 15, 1900, and was taken ill in the latter part of that month. About April 1, 1900, the said Mary Crocheron told plaintiff that she would give to plaintiff ten shares of eight per cent. preferred stock of the Cook & Bernheimer Company, if plaintiff would give up her work as a dressmaker, and stay at home with said Crocheron, as long as the latter lived, taking care of her as her maid and companion. This stock then belonged to the said Crocheron, and, under this agreement, was to become the property of the plaintiff upon the death of said Crocheron. The plaintiff agreed to this proposition,

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and gave up her business as a dressmaker, and stayed at home and took care of said Crocheron until the latter died. The testimony shows that plaintiff devoted, on an average, fifteen hours a day to the care of the said Mary Crocheron. During this time the deceased frequently alluded to this stock as being plaintiff's property, and when the check for the dividend thereon came, the said Mary Crocheron directed that the defendant Bryan should get the check cashed and give the money to plaintiff, which was done. The evidence, introduced on behalf of defendants, shows that the mother of plaintiff also received a number of gifts from the said Mary Crocheron, but there is not sufficient proof to connect plaintiff with the transactions between her mother and the said Mary Crocheron. The contract between said Crocheron and the plaintiff appears to be entirely separate from any agreement or arrangement between the mother of plaintiff and the said Mary Crocheron. On or about June 6, 1900, said Mary Crocheron died, leaving a last will and testament, made sometime previous to the contract in suit, which will, after making a few legacies to parties other than plaintiff or her mother, left all the residue and remainder of the estate to the defendant James Bryan. At the time of the death of said Mary Crocheron, the ten shares of eight per cent. stock of the Cook & Bernheimer Company passed into the possession and under the control of the defendant-executors, upon whom plaintiff made a due demand, but who refused to assign and deliver the same to the plaintiff, on the ground that said stock formed part of the estate disposed of by the will and did not belong to the plaintiff. The latter thereupon brought this action.

Although the answer did not set up a defense of insanity, the defendants were allowed, upon the trial, to amend so as to set up the "senile imbecility or dementia" of the deceased as a defense. Some evidence, tending to show a mental incapacity on the part of the deceased, was introduced, but this testimony is disputed, on equally good authority, and the testimony appears to be fairly preponderating in favor of the claim of sanity and mental capacity. The doctors who testified for plaintiff examined the deceased at a time considerably nearer that of the making of the contract with plaintiff than did the doctors who were called for defendants, and they seem to be more positive in their conclusions as to the sanity of the deceased than is Dr. Boskowitz, who examined her in November, 1899, as to her alleged incapacity; while the defendants'

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other expert, Dr. Cooper, bases his opinion upon an examination made shortly before her death and some months after the making of the contract with plaintiff. It must be held that, under the proofs in this case, Mary Crocheron was sane and mentally competent at the time she made the contract with plaintiff.

No claim of fraud is made in this case, and the defendants' counsel relies mainly on his contention that the plaintiff had an adequate remedy at law, and should have brought this action at Trial Term, instead of Special Term. The defendants, however, did not plead a want of equity jurisdiction in their answer, nor allege that plaintiff had an adequate remedy at law, and hence they were in no situation to insist upon the trial that an action in equity would not lie. See Watts v. Adler, 130 N. Y. 648. The court has jurisdiction over the parties and over the subject-matter of the action, and no occasion is here presented that requires a discussion of the question whether the plaintiff should have brought an action in conversion, or, as claimed by defendants' counsel, an action on *quantum meruit* for the value of her services, instead of this action in equity for a specific performance.

The plaintiff is entitled to judgment directing the assignment, transfer and delivery of the said stock to plaintiff, with the dividends collected thereon since the death of said Mary Crocheron, together with interest on such dividends from the dates when the same were collected by defendants, besides the costs of this action.

Judgment accordingly.

JAMES O'SULLIVAN, Plaintiff, *v.* THE METROPOLITAN STREET RAILWAY CO., Defendant.

(Supreme Court, New York Special Term, November, 1902.)

Attorney — Client's right to change — Payment of, or security to, former attorneys.

At any point in a suit or proceeding a client may arbitrarily change his attorneys, subject to the payment or the securing of the fees of his former attorneys provided their conduct has not been improper or neglectful.

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Where the cause of action was for negligence and damages, the court, in discontinuing a similar action begun for the client by the original attorneys, secured them out of any recovery he might ultimately obtain in the new action.

MOTION to discontinue action.

Walter H. Wood, for motion.

Elliot, Jones & Escher, opposed.

GILDERSLEEVE, J. The plaintiff was injured by a car belonging to the defendant. While he was in the hospital, a representative of the law firm of Elliot, Jones & Escher called upon him, and got him to sign a written retainer of said firm authorizing them to bring this action for damages, and also had said plaintiff swear to the complaint. Both of these signatures were obtained on April 9, 1901. Before the summons and complaint were served, the said law firm received a telephone message from Dr. Fitch, on behalf of plaintiff, requesting them to do nothing further in the case until they had heard from plaintiff. They subsequently learned that another lawyer, to wit, Walter H. Wood, was about to bring suit for plaintiff on the same cause of action, whereupon the said firm of Elliot, Jones & Escher served the summons and complaint which they had prepared. The plaintiff, by said Walter H. Wood, makes this motion to discontinue the said action so brought by Elliot, Jones & Escher. The latter have no objection to a discontinuance, provided they are paid a reasonable fee for their services. They claim that they have devoted considerable time and labor to an investigation of the circumstances of the accident, in addition to drawing the summons and complaint. The said attorneys also claim that they spent twenty-five dollars on the reference to take testimony concerning the questions of fact put in issue on this motion. The said attorneys suggest that the motion to discontinue, without costs, be granted, but that the order should provide that plaintiff shall pay to the said attorneys, Messrs. Elliot, Jones & Escher, out of any recovery for the said injuries that plaintiff may obtain from defendant, a sum to be

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fixed by the court, as their compensation for the services rendered, together with twenty-five dollars, their disbursements, as aforesaid.

The rule is that a client has the right, without assigning any cause, at any point in a suit or proceeding, to change his attorney, subject, however, to the payment of the former attorney's fees in a proper case, or the securing of such fees, if they cannot then be fixed and determined. The court will ordinarily see that the original attorney is protected as to his fees, upon the substitution of another attorney, where the original attorney's conduct has not been improper or neglectful. See Matter of Prospect Avenue, 85 Hun, 257.

Under the facts of this case, I am of the opinion that Messrs. Elliot, Jones & Escher are entitled to the protection of the court as to their fees.

An order may be entered discontinuing this action, without costs, and providing that plaintiff shall pay, out of any recovery which he may obtain from the defendant by reason of the injuries upon which the cause of action herein is based, to the said law firm of Elliot, Jones & Escher the sum of $100, together with the sum of $25 disbursements. No costs of this motion.

Ordered accordingly.

PATRICK W. CULLINAN, State Commissioner of Excise, Etc., Plaintiff, *v.* THE CRITERION CLUB, and THE FIDELITY AND DEPOSIT CO. OF MARYLAND, Defendants.

(Supreme Court, New York Trial Term, November, 1902.)

Liquor Tax Law — Complaint — Statutory exceptions as to the sale of liquors in prohibited hours need not be negatived.

A verdict rendered in his favor, in an action brought by the State commissioner of excise against a so-called club for selling liquors between one and five a. m., in violation of L. 1896, ch. 112, § 31b, will not be set aside merely because the complaint did not negative the subsequent provision, near the end of said section, excepting from said subdivision b a corporation or association organized when and as therein prescribed.

MOTION to set aside a verdict.

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Herbert H. Kellogg, for plaintiff.

Boardman, Platt & Soley, for defendants.

GREENBAUM, J. Section 31 of the Liquor Tax Law, which prohibits the sale of liquor on any day "between one o'clock and five o'clock in the morning" (clause b), provides "that a corporation or association, organized in good faith, under chapter five hundred and fifty-nine of the laws of eighteen hundred and ninety-five, or under any law which prior to May sixth, eighteen hundred and ninety-five, provided for the organization of societies and clubs for social, recreative or similar purposes, and which corporation or association was actually lawfully organized, and if a corporation, its certificate of incorporation duly filed, prior to March twenty-third, eighteen hundred and ninety-six, and which at such date trafficked in or distributed liquors among the members thereof, is excepted from the provisions of clauses 'a,' 'b,' 'c,' and 'd' of this section."

The defendant moves to set aside the verdict heretofore directed by the court, upon the ground that the provision above quoted is to be treated as an "exception" in the statute, which the plaintiff was obliged to negative in his pleading.

The case of People v. Crotty, 22 App. Div. 77, seems to me to be controlling here in opposition to defendants' contention.

The exceptions discussed in the Crotty case related to the provisions exempting pharmacists and hotelkeepers from the general operation of the law.

The exception relating to corporations, as above set forth, follows the provisions affecting pharmacists and hotelkeepers in section 31, and it was not embodied in the original enactment. There seems to be no valid reason for treating this exception differently from the exceptions construed in the Crotty case. The exception is not absolute as to all the corporations which are specifically referred to in the provision. To avail itself of this exception it would be necessary to show that the corporation was organized in "good faith," and that it "trafficked in or distributed liquors among its members" as therein provided.

It was, therefore, incumbent upon the defendants "to aver and prove that the case was one falling within the terms" of the pro-

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vision under which it claims exemption. Rowell v. Janvrin, 151 N. Y. 69.

As to the point urged that the testimony of the witness Rush Simms, called by defendants, did not show that he was at the place when the alleged violation occurred, during the prohibited hours, I find from a rereading of the stenographer's minutes taken at the trial, that he unequivocally admitted that he was at the premises between one and five o'clock a. m., and that he unqualifiedly stated that liquors were sold there during those hours.

The motion for a new trial is denied.

Motion denied.

ANNA YUTTE, Plaintiff, *v.* JOHN YUTTE et al., Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Dower — Defeated by the husband's deed before marriage — Delivery to a third person.

An owner of two lots separately conveyed one of them to each of his two sons, they actually paying the consideration of one dollar, and he in their presence handed the deeds to an attorney requesting him to hold them during the grantor's life, at his death record and deliver them to the grantees, the grantor during his life to receive the rents and profits. He subsequently married, thereafter died, and thereupon the attorney recorded the deeds and delivered them to the grantees.

Held, that the title passed to the sons when the grantor delivered the deeds, in their behalf, to the attorney, and that therefore when the widow subsequently married the grantor there was in him no estate to which dower could attach.

ACTION for dower.

Norman W. Kerngood, for plaintiff.

McCrea & Taylor (William G. McCrea, of counsel), for defendants.

KEENER, J. This is an action by a widow to establish a right to dower in two parcels of real estate.

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The real estate in which dower is claimed was purchased in April, 1900, by Henry Yütte, the plaintiff's deceased husband. On September 18, 1900, he executed deeds conveying these two lots to his sons John and Henry, the principal defendants in this action. The sons were present at the execution of the deeds and actually paid the consideration of one dollar expressed therein. After the deeds were executed and acknowledged and while his sons were still present, the grantor handed them to one Forrest, an attorney, asking Forrest to take possession of them and to hold them during his lifetime and at his death to record and deliver them to the grantees. He also stated to Forrest that he wished to have the rents and income from the property during his lifetime. On September 19, 1901, a year after the execution of the deeds, Yütte married the plaintiff; and died intestate, November 21, 1901. A few days thereafter, Forrest had the deeds recorded and delivered them to the grantees in accordance with the grantor's instructions. The defendants concede that the grantor collected and expended the rents from the two houses and made repairs on them and kept them insured in his own name during his lifetime.

It is alleged in the complaint that the grantor represented to the plaintiff that he owned this real estate and that she was induced to marry him by this representation. It is also alleged in the complaint that the grantees were guilty of fraud and conspiracy in obtaining possession of the deeds and in their subsequent dealings with the property. But these allegations were all denied by the answer and upon the trial no proof was offered as to any of them.

The sole question arising from these facts, therefore, is whether Yütte, the grantor, was seized of this real estate at any time during the marriage. Laws of 1896, chap. 547, § 170.

Whether the deed in this case is to be treated as a present conveyance or as a delivery to a third person for subsequent delivery to the grantees, the grantor seems to have divested himself of title when he handed the deeds over to Forrest. There are facts here sufficient to make the transaction a present delivery to a stranger for the use of the grantees, which is tantamount to a delivery to the grantees themselves. Church v. Gilman, 15 Wend. 656; Crain v. Wright, 114 N. Y. 307. The additional directions to Forrest are not necessarily inconsistent with a present delivery. Crain v.

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Wright, 114 N. Y. 307, 311. The grantees were present and paid the agreed consideration, so that there can be no question as to their acceptance of the conveyances. The directions to Forrest might well evidence nothing further than an amicable arrangement to keep the deeds from record during the grantor's life, in order that no question should arise as to the rights which it was agreed he should have during his lifetime. Such being the case, the grantor was not seized of this land when he married the plaintiff, and she took no right of dower in it.

But assuming there was no present delivery, the other possible interpretation of this transaction is equally fatal to the plaintiff's claim. It may be treated as a delivery of a deed to a third person to deliver to the grantees upon the happening of a contingency, namely, the death of the grantor; a contingency certain as to event but uncertain as to date.

When a deed is delivered in escrow, that is, to be delivered to the grantee by the depositary upon the performance by the grantee of some condition, and the grantor dies and the grantee thereafter performs the condition, a delivery to him is effectual to pass title. The passing of title is deemed to be as of the date of the delivery of the deed to the third person. Perryman's Case, 3 Rep. 84. This doctrine has also been applied where the contingency expressed was the death of the grantor. Tooley v. Dibble, 2 Hill, 641, 643; Hathaway v. Payne, 34 N. Y. 92, 105, 113; Campbell v. Morgan, 68 Hun, 490, 495. The result from these authorities seems to be inevitable. The grantor divested himself of title when he delivered the deeds to Forrest. Hence the plaintiff has no dower right in this real estate.

Judgment for the defendants, with costs. Settle decision and final judgment on two days' notice.

Judgment for defendants, with costs.

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Matter of the Application of GERTRUDE M. STEWART, a Judgment Creditor, for the Examination of the MUTUAL RESERVE LIFE INSURANCE CO., Etc.

(Supreme Court, New York Special Term, November, 1902.)

Supplementary proceedings — Untenable where the debtor, a foreign corporation, has ceased to exist as a legal entity — Collateral attack.

When a foreign corporation has been duly dissolved in the State of its incorporation it ceases to exist anywhere as a legal entity, an action pending against it in this State falls, and the plaintiff, or creditor, cannot take supplementary proceedings on a judgment subsequently recovered against it here and examine a third party as to property of it alleged to be in the third party's hands.

While, in such proceedings, the judgment upon which they are taken cannot be attacked collaterally, the third party may show that the judgment is and was void and therefore is no judgment at all.

MOTION by the Mutual Reserve Life Insurance Company to vacate an order for its examination.

Pavey & Moore, for judgment creditor.

George L. Burnham, for Mutual Reserve Life Insurance Company.

SCOTT, J. This is a motion by a third party to vacate an order for its examination upon a judgment recovered against the Northwestern Life Assurance Company. Gertrude M. Stewart, the judgment creditor, commenced an action in this court on June 3, 1899, against the Northwestern Life Assurance Company, a corporation organized under the laws of the State of Illinois as an insurance company on the assessment or co-operative plan. The defendant appeared and answered, but when the cause was reached for trial defaulted and a judgment was entered on June 3, 1902, for the sum of $3,282.50. The motion to vacate the third party order is

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urged upon several grounds, only one of which it is necessary to discuss. That ground is that the judgment upon which the order is based was and is void. It is obvious that in order to justify any proceedings supplementary to execution there must be a judgment to furnish a basis for the proceedings. Where, as in the present case, there appears to be a judgment regularly entered after appearance or personal service, the third party sought to be examined will not ordinarily be heard to attack the judgment collaterally for any irregularity, or even upon the ground that jurisdiction was not properly obtained. Such objection must, as a rule, be taken, if taken at all, by the judgment debtor. Bucki v. Bucki, 26 Misc. Rep. 69; Wetmore v. Wetmore, 149 N. Y. 521. In the present case, as will be shown, there is no judgment debtor to attack the judgment, and there was no defendant when the judgment was rendered. While the regularity of the judgment cannot be attacked collaterally upon a proceeding of this nature, it may be shown that the judgment upon which the proceeding rests is, and was when rendered, void, and, therefore, no judgment at all. Griffen v. Dominguez, 2 Duer, 656. Thus, if it should appear that a defendant had died before judgment, and that notwithstanding his death a judgment had been entered against him such judgment would be absolutely void (Code Civ. Pro., § 765), and no proceeding like the present could be based upon it. In such a case it cannot be doubted that a third party sought to be examined could raise the objection that the judgment was void, and hence that the proceeding could not be maintained. As has been said, the Northwestern Life Assurance Company was an Illinois corporation, subject to the laws of that State and to the jurisdiction of its courts. It is well settled that policyholders and claimants under policies issued by a life insurance company, whether residents of the State in which the company is incorporated, or of a foreign State, are presumed to know the terms of the company's charter and the laws regulating its existence and are bound thereby, for every corporation necessarily carries its charter wherever it goes for the transaction of business. Relfe v. Rundle, 103 U. S. 222; Fry v. Charter Oak Life Ins. Co., 31 Fed. Repr. 197. It appears that an action was brought against the Northwestern Life Assurance Company in the Superior Court of Cook county, Illinois, by the superintendent of insurance of the State of Illinois, praying for the dissolution of the Northwestern company, and on January 18, 1891, a decree

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was entered in that action whereby, among other things, it was decreed that the said company be, and the same thereby was dissolved. Thereafter such proceedings were had that, on August 29, 1901, a decree was entered whereby the receiver appointed in the action was discharged and the proceedings brought for the purpose of dissolving and winding up the company were brought to a final conclusion. It thus appears that the dissolution of the company was effected after the commencement of the action in this court by the applicant Stewart, and before the rendition of the judgment upon which this proceeding is founded. That the decrees of the Superior Court of Cook county are conclusive here cannot be questioned, unless it be made to appear either that the court in which they were rendered had no jurisdiction to pronounce them, or that they were entered by fraud. Lazier v. Westcott, 26 N. Y. 146; Kinnier v. Kinnier, 45 id. 535; Hunt v. Hunt, 72 id. 223; Pacific Gas Co. v. Wheelock, 80 id. 278. It is not suggested that the Superior Court of Cook county had not jurisdiction under the laws of Illinois to entertain the action for the dissolution of the Northwestern company, and to enter a decree dissolving it. Nor is it alleged that the decree dissolving the company was procured to be entered by fraud, or tainted in any way by fraud, although one of the counsel for the applicant avers that he believes that there was fraud in certain proceedings which preceded the action by the State commissioner of insurance, but even these averments are not supported by any statement of facts to justify the belief expressed. I, therefore deem it to be established that the Northwestern Life Assurance Company was dissolved and ceased to exist prior to the entry of the judgment which furnishes the basis for this proceeding. The effect of such a dissolution seems to be well settled. It is said by Mr. Morawetz (§ 1031) that "The dissolution of a corporation, at common law, not only means that the company has lost its franchises and can no longer act in a corporate capacity, but it implies that the corporation has wholly ceased to exist, in legal contemplation, and will not be recognized as a corporate body for any purpose. It follows, that suits brought by or against a corporation are abated by its dissolution; and a judgment purporting to be rendered against a corporation which is not in existence is a nullity." The Supreme Court of the United States, speaking of a corporation against which a decree of dissolution has been entered, said: "Its existence as a legal

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entity was thereupon ended; it was then a defunct institution, and judgment could no more be rendered against it in a suit previously commenced, than judgment could be entered against a dead man dying *pendente lite.*" The same rule has repeatedly been applied by the courts of this State. McCulloch v. Norwood, 58 N. Y. 562; People v. Knickerbocker Life Ins. Co., 106 id. 619; Rodgers v. Adriatic Fire Ins. Co., 87 Hun, 384. The conclusion to which I am inevitably led is that the judgment entered by the applicant Gertrude M. Stewart against the Northwestern Life Assurance Company in this court on June 3, 1902, was a nullity and absolutely void, and consequently that it cannot afford a basis for this proceeding.

The motion to vacate the order for the examination of the Mutual Reserve Life Insurance Company must, therefore, be granted, with ten dollars costs.

Motion granted, with ten dollars costs.

THE CITY OF IRONWOOD, Plaintiff, *v.* WILLIAM E. COFFIN and WALTER STANTON, Members of and Composing the Firm of COFFIN & STANTON, MALCOLM BAXTER, JR., CHARLES L. HYDE, CHARLES H. JACKSON and THOMAS P. WICKES, as Receiver, Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Intervening by third parties — Requisites of right — Code C. P., § 452.

In 1894 the plaintiff, a foreign city, sued in this action the defendant firm of Coffin & Stanton for the value of city bonds they had sold, wrongfully as alleged, and the city offered to restore to the firm what it had been paid by the firm on account. In 1895 in another action in Michigan, in a Federal court, the bonds were declared void. In 1897 the defendant Wickes, intervening herein as receiver of said firm which had failed in Oct., 1894, recovered of the city, on a counterclaim not defended by it, the amount which the firm had paid the city on account. In 1902 the city was relieved from its default upon the counterclaim on terms, including the privilege to the receiver to hold his judgment provided he returned the city the bonds. Upon an application of bondholders,

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vendees or pledgees under the firm before action brought by the city, to intervene, avail themselves of the receiver's said privilege, have his judgment amended so as to be a judgment in their favor as the real parties in interest, and have their claims and his adjudicated in this action,

Held, that Code C. P., § 452, did not entitle them to any relief.

That, if it be assumed that the right to recover what the firm paid the city on account of the invalid bonds attached to the latter and passed with them on sale or pledge, then the firm lost it before they failed, their receiver never took it, and the bondholders have not and never have had any interest in his judgment.

That, as the city sought to recover the value of the bonds only, and of the firm only, and did not seek a lien upon any bonds which the firm had sold or pledged, the bondholders had no interest in the subject of the action.

That, as the receiver's counterclaim was upon a cause of action for a money judgment only, the bondholders would not be permitted to intervene on their own motion.

That this was neither the time nor the method for determining the conflicting claims, of the receiver and of the bondholders, to the money to be derived from his judgment.

Motion by bondholders to intervene in the action as parties in interest. The action was begun in 1894. Thereafter, and in October, 1894, the firm of Coffin & Stanton failed.

Goodale, Hanson & Price, for petitioners.

Hawkins & Delafield, for plaintiff.

Edward S. Hatch, for receiver.

Scott, J. In the year 1893 the plaintiff, a municipal corporation, undertook to issue its municipal bonds, and certain officers of the city, assuming to act for the city, sold and delivered such bonds of the par value of $150,000 to the defendants Coffin & Stanton for a present cash payment of $25,000, and the promise of further payments in the future. Coffin & Stanton made no further payments and the plaintiff began this action against them, tendering the amount it had received for the bonds with interest, and demanding a return of such bonds, or of so many of them as

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had not been sold or hypothecated, and an accounting for such as had been sold or hypothecated. Coffin & Stanton answered, denying that any of the bonds were in their possession at the time of the commencement of the action, the fact being that they had all been either sold or hypothecated. Coffin & Stanton soon after failed. In 1895 an action was brought in the Federal court in Michigan against the plaintiff by certain holders of the bonds, in which action the bonds were held to be invalid and to have been illegally issued. In 1897 the defendant Wickes was appointed receiver of Coffin & Stanton, and, on motion, was made a party to this action. He filed an answer in which, relying upon the decision in Michigan, he set up a counterclaim for the amount paid by Coffin & Stanton for the bonds issued to them. No defense being made to his counterclaim, he obtained a judgment against the plaintiff for upward of $30,000. An order has recently been made (38 Misc. Rep. 339) opening the plaintiff's default, and permitting it to come in and defend against the counterclaim upon terms. The present motion is made by holders of the bonds, through sale and hypothecation, who asked that they be allowed to intervene in the action as parties in interest; that the order recently made, permitting the plaintiff to defend against the counterclaim of the receiver, be so amended as to allow the bondholders to come in and take advantage of the privilege extended to the receiver to deliver back the bonds to the plaintiff, and hold the judgment; that the judgment in favor of the receiver be amended so as to be a judgment for the bondholders as the real party in interest; and that the conflicting claims of the receiver and the bondholders be adjudicated and the judgment amended accordingly. The applicants' right to become parties to the action must be tested by section 452 of the Code of Civil Procedure, and to permit them to do so it must appear either that a complete determination of the controversy cannot be had without their presence or that they have an interest in the subject of the action. The application is based upon the general proposition that the right to recover the consideration paid for these invalid bonds passed with the bonds themselves to the persons to whom Coffin & Stanton sold or pledged them, that is, to the applicants here and those in like situation with them; hence it is argued that the receiver stands merely in the position of trustee

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for the bondholders who are the real parties interested in the judgment which he has recovered. If the general proposition above stated be admitted, the conclusion sought to be drawn from it seems to be fatally illogical. For, if the right to recover the consideration passed upon the sale or hypothecation of the bonds to the purchasers or pledgees it had passed out of Coffin & Stanton long before the receiver was appointed, hence, never passed to the receiver and could not have been made the basis of a judgment in his favor. Whatever may be his right to recover upon his counterclaim it is not a right as the representative of the bondholders to whom the bonds had passed before his appointment. The right of the bondholders to recover the consideration paid never passed to him, but remained always in them and remains in them to-day, unless by some circumstance not arising out of or affected by this litigation, it has been lost. The applicants, cannot, therefore, succeed on the ground that they are the real parties interested in the receiver's judgment. Nor can they succeed on the ground that they are interested in the subject-matter of the action. So far as they are concerned, the action, even under the allegation of the complaint, was not an action *in rem*. The plaintiff did not seek to impress a lien upon any of the bonds which had passed out of the possession of Coffin & Stanton, and did not seek to recover the bonds or their value from anyone except Coffin & Stanton. In no sense were the applicants affected by or interested in the cause of action stated against Coffin & Stanton; no relief was asked against them, and no judgment that could have been entered upon the complaint could have affected them or the title to their bonds in any particular. The cause of action set up in the counterclaim was not, as has been shown, a cause of action based upon any supposed right of the applicants, and, in any event, as it was a cause of action for a money judgment only, the applicants cannot be allowed to intervene as parties to the litigation which may arise upon that counterclaim. Bauer v. Dewey, 166 N. Y. 402. This is neither the time nor the method for determining any conflicting claims there may be between the receiver and these applicants to the money to be derived from the receiver's judgment.

The motion in all its branches must, therefore, be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

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THE PEOPLE ex rel. PHILIP CAREY MANUFACTURING Co., Relator, v. THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK, Defendants.

(Supreme Court, New York Special Term, November, 1902.)

Corporation, foreign — Taxable if it is doing, in the State of New York, a continuous and permanent business.

Where the evidence presented to tax commissioners, relative to the taxability of a foreign corporation, shows that it has taken out a certificate permitting it to do business in the State of New York, that it has therein stated 70 Cortlandt street, New York city, to be its principal place of business within this State, that it maintains here an office, sales room and storage rooms, that it keeps goods for sale here and here sells them, there is an indication of an intention upon its part to do here a continuous and permanent business sufficient to justify its taxation upon the value of its goods here in process of distribution, the value of its office furniture here and its cash on hand and in bank here.

WRIT OF CERTIORARI to obtain a vacation or reduction of relator's assessment for the purposes of taxation.

Petrasch & Burnet, for relator.

George L. Rives, Corporation Counsel (A. T. Campbell, Jr., of counsel), for defendants.

SCOTT, J. The relator, a foreign corporation, complains of its assessment for the purposes of taxation, and has sued out a writ of certiorari to obtain a vacation or reduction thereof. In its statement to the commissioners the relator stated that it was organized under the laws of the State of Ohio, having its principal office at Lockland in that State; that it had complied with the provisions of chapter 687, Laws of 1892, being the General Corporation Law, under which foreign corporations are required to obtain a certificate from the Secretary of State as a condition of doing business in this State; that 70 Cortlandt street, New York city, was

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indicated as its principal place of business within this State; that there was nothing receivable on notes and open accounts in the State of New York; that the value of goods, wares and merchandise in process of distribution in the State of New York was estimated at $2,000; the value of its safes, fixtures and furniture in the city of New York was $100, and the cash on hand and in bank was $100; that the amount invested in business in the State of New York was "none except as above." Accompanying this statement was a letter from relator's attorneys, a copy of which is annexed to the petition, and thus adopted by the relator. In this letter the following statement is made bearing upon the taxability of the company: "The value of the goods, wares and merchandise is necessarily estimated, as such goods, wares and merchandise are kept in storage or in transit in the city of New York merely for the purpose of distribution to customers here. The Philip Carey Company is a corporation of the State of Ohio engaged in the manufacture of pipe and boiler covering and roofing at Lockland, Ohio, where it has its principal office and manufactory. It has a sales or storage-room in the city of New York to which it sends its manufactured goods to be sold or distributed. The proceeds of the sales of these goods are remitted to the principal office of the company in Ohio." As this letter was written for the purpose of inducing the tax commissioners not to assess the relator, it may be assumed that all the facts are stated which would so induce the commissioners, and that the facts were stated as favorably to the relator as strict accuracy would warrant. At all events the statement and letter were what the commissioners acted upon, and it is upon the facts as stated therein that the legality of the assessment must be tested. The commissioners assessed the relator at the sum of $2,200. The case as made out by the relator upon its own showing does not differ in its essential feature from that considered by the Court of Appeals in People ex rel. Armstrong Cork Co. v. Feitner, 157 N. Y. 159. In that case the court held that the evidence before it showed a plain intent on the part of the corporation and its officers to establish a continuous business in the city of New York, and for this reason distinguished the case then before it from People ex rel. Parker Mills v. Commissioners, 23 N. Y. 242, and People ex rel. Sherwin Williams Co. v. Barker, 5 App. Div. 246; affd., 149 N. Y. 623. That the taxability of a foreign corporation upon property actually in this State, de-

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pends upon the continuous nature of the business carried on here was recognized in the earliest case dealing with that subject under the law as it now stands (People ex rel. Parker Mills v. Commissioners, *supra*), wherein Judge Selden, writing for the court, gave as the determining reason why the relator in that case should not be assessed "that there is no sum invested or used for the purpose of carrying on a continuous business in this State." It is true that the Armstrong Cork Company case differs from the one at bar, in that in that case it appeared that the relator manufactured a part of its goods in this State. But as was pointed out in People ex rel. Crane Co. v. Feitner, 49 App. Div. 108, the Court of Appeals did not apportion the value of the goods manufactured here and in Pennsylvania, nor did it treat the isolated fact that some part of the goods were manufactured here as controlling its decision, but plainly regarded it merely as one of a group of evidential facts bearing upon the intent of the corporation to conduct a regular and permanent business in this State. It appears in this case, as it appeared in the more recent of the cases above cited, that the relator had procured from the Secretary of State the certificate prescribed by section 15 of the General Corporation Law, as a prerequisite to doing business in this State. The relator earnestly argues that that fact does not render it liable to assessment and taxation. I do not understand that it has ever been held that evidence of compliance with the statute by a foreign corporation, standing alone, renders the corporation liable to be taxed. But it is an evidentiary fact to be taken into account, and when it appears that such a corporation, in addition to taking out such a certificate maintains an office, salesroom and storage-rooms in this State and keeps goods here for the purpose of sale, and does sell them within the State, a strong case is made for believing that the corporation is carrying on a continuous and permanent business here. I find myself quite unable to distinguish the present case from those above referred to and others in which a similar assessment has been sustained.

The writ must, therefore, be dismissed, with costs.

Writ dismissed, with costs.

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EDWARD A. LE ROY, Plaintiff, *v.* ROBERT A. CHESEBROUGH, Defendant.

(Supreme Court, New York Special Term, November, 1902.)

Injunction — If dependent on the nature of the action, the plaintiff cannot change the ground he took in his complaint and affidavits — Code C. P., § 603.

Where the right to a temporary injunction depends on the nature of the action the plaintiff must rest upon his complaint and its supporting affidavits, and the issues of the motion are limited to those raised by these papers and by the answering affidavits.

Accordingly, where the gravamen of the complaint is that the defendant, the adjoining proprietor, is trespassing on the building of the plaintiff by cutting away its stoop, he cannot, when beaten on that issue upon the return of an order to show cause why a temporary injunction should not issue, change his ground and set up by replying affidavits a new grievance — in that the defendant's same acts are destroying an alleged easement which the encroaching stoop of the plaintiff has in and over the defendant's lot.

MOTION for an injunction *pendente lite.*

Holt & Gaillard, for plaintiff.

Edward H. Childs, for defendant.

SCOTT, J. This is an action for an injunction to prevent the cutting away of a part of plaintiff's front steps, and the present motion is for an injunction *pendente lite.* There is thus presented a case under section 603 of the Code of Civil Procedure wherein the right to an injunction depends upon the nature of the action. The plaintiff's right to a continuance of the present injunction must rest, therefore, upon his complaint and the affidavits upon which the order to show cause was granted. The complaint alleges that the defendant wrongfully "entered into and upon plaintiff's premises and then and there mutilated and destroyed the stone steps leading from the front door of the plaintiff's prem-

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ises to the street, by cutting off a portion of said steps, thereby grievously damaging plaintiff's said premises. That the defendant threatens to continue his said trespass upon plaintiff's premises." This complaint and the affidavit accompanying the order to show cause indicate very clearly that the action is brought to restrain an actual trespass upon plaintiff's freehold.

The defendant answers the motion by showing the following facts: The parties own adjoining houses, that of the plaintiff lying to the east of that of defendant. The westerly stoop line of plaintiff's house projects from five to five and one-half inches over the defendant's property, and the newel post at the bottom of the stoop projects some sixteen inches. The defendant being about to alter his house and bring the easterly wall thereof out nearer the building line, found that he could not do so without cutting away the overhanging or encroaching portion of plaintiff's steps, and with plaintiff's passive acquiescence, if not actual consent, he proceeded to so cut away the steps. Subsequently, and after some of the cutting had been done, a quarrel arose between the parties, not over the cutting of the stoop, but over the location of a window in the rear of defendant's house. Plaintiff then revoked any permission he had given for the cutting away of his steps and obtained this injunction to restrain the further cutting and to compel the restoration of what had already been cut. The plaintiff was given an opportunity to reply to defendant's affidavits and has done so, and does not deny that his stoop and newel post encroach on defendant's property, and gives but a qualified denial to defendant's assertions as to the consent to cut. Upon the facts as submitted, it is evident that the plaintiff cannot obtain an injunction in this action as his complaint now stands. He alleges a trespass upon his land, but the uncontradicted proof is that all the defendant is doing is to remove an obstruction or encroachment upon his own land. In his replying affidavit the plaintiff has not contented himself with meeting the allegations of defendant's answering affidavits, but has stated certain facts, not referred to in his complaint or moving affidavits, by which he claims he has gained an easement over defendant's land, resting his contention in this regard upon Lampman v. Milks, 21 N. Y. 505, and the long line of authorities which have followed that case. The new matter included in this replying affidavit I cannot consider upon this motion. The plaintiff's case for a temporary injunction must

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stand or fall upon the claim made by his complaint and moving affidavit which alone the defendant was called upon to answer. The fact upon which plaintiff now relies to sustain the injunction is that his house was built in 1861 by one Sayers, who owned, at that time, the property now owned by defendant, and that Sayers first sold plaintiff's house in the same condition that it now is relatively to the property at present owned by defendant. Hence, as is contended, the plaintiff's property acquired an easement for the encroachment of the stoop over the adjoining property. This is entirely a new statement of facts, of which no hint or suggestion is contained in the complaint or moving papers, and which the defendant was not, therefore, called upon to answer and has not answered. Where, as in the present case, the right to an injunction *pendente lite* depends upon the nature of the action, the complaint must allege a state of facts which, if true, constitute a cause of action for an injunction, and the affidavit upon which the injunction is applied for must state the evidentiary facts going to sustain the complaint so that the court may see that the facts stated in the complaint are probably true. The defendant in answering the motion may deny or explain any facts alleged by the plaintiff, or may set forth a new state of facts constituting a defense. If the plaintiff files replying affidavits he is strictly limited to the issues raised by the moving and answering affidavits. He cannot undertake to sustain his motion for an injunction by stating a different state of facts from those embraced in his moving papers. In the present case the plaintiff, by his complaint and moving affidavits, clearly proceeds upon the theory that defendant is actually encroaching upon his freehold. There is no suggestion that his grievance is that defendant is proceeding to destroy an easement. The present motion must, therefore, fail, although upon the new state of facts attempted to be set up by plaintiff, if made the foundation for an action and motion, and if not successfully met by defendant, he might possibly succeed. Wilson v. Wightman, 36 App. Div. 41.

For the reasons stated the present motion will be denied, with ten dollars costs, without prejudice, however, to such further action as the plaintiff may be disposed to take.

Motion denied, with ten dollars costs.

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Matter of the Application of HENRY L. DRURY, to Compel the Delivery to him, as Town Clerk, of the Books and Papers Belonging to that Office.

(Supreme Court, Oswego Special Term, November, 1902.)

Office — The failure of one, elected a town clerk, to take and file his oath of office in time does not create a vacancy in the office where it has not already been forfeited by judicial action.

The provisions of the Town Law (L. 1890, ch. 569, § 51), relative to the times within which one elected a town clerk must take the constitutional oath of office and file it in the office of the town clerk, are directory merely.

Where he makes and files such an oath before his term begins and before the office has been declared forfeited by judicial action no vacancy exists and the town board cannot appoint.

Upon the same principle his failure to file in time a verified statement of his election expenses cannot *ipso facto* create a vacancy.

THIS is an application made under section 2471a of the Code of Civil Procedure to compel the defendant Lewis P. Taylor, the present incumbent of the office of town clerk in the town of Oswego, to deliver the books and papers of that office to the applicant herein, Henry L. Drury, on the ground that he, instead of Lewis P. Taylor, is the legal incumbent.

E. J. Mizen and D. P. Morehouse, for applicant.

Brownell & Culkin, for defendant.

WRIGHT, J. The applicant herein was duly elected town clerk of the town of Oswego at the general election held November 5, 1901. He neglected to subscribe and file his oath within the time prescribed by law; he also failed to file his verified statement of election expenses within the statutory period. The town board thereupon, on January 18, 1902, appointed the defendant as town clerk to fill the vacancy, and he now has the books and papers of that office in his possession.

Section 51 of the Town Law (L. 1890, ch. 569) provides:

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"Every person elected or appointed to any town office, * * * shall, before he enters on the duties of his office, and within ten days after he shall be notified of his election or appointment, take and subscribe * * * the constitutional oath of office, * * * which shall be administered and certified by the officer taking the same, * * * and shall within eight days be filed in the office of the town clerk, which shall be deemed an acceptance of the office; and a neglect or omission to take and file such oath, or a neglect to execute and file, within the time required by law, any official bond or undertaking, shall be deemed a refusal to serve, and the office may be filled as in case of vacancy."

On December 21, 1901, prior to the appointment of the defendant as town clerk, and prior to the time when the applicant's official term of office began, the applicant took and filed the constitutional oath of office, although it was done some days subsequent to the time prescribed by statute.

The defendant claims that the omission to take the oath within the statutory period constituted, of itself, a vacancy in the office, and that the subsequent action of the applicant in taking and filing the oath had no force or validity.

The applicant urges that the statute fixing the time for filing the oath is directory only, and not mandatory, and that, consequently, the fault was cured by the subsequent filing.

The omission to file the oath was, at the expiration of the statutory period, *prima facie* evidence of a "refusal to serve" on the part of the applicant, but when the members of the town board convened to make an appointment, they found the oath on file, and knew from that fact that the applicant had not actually "refused to serve."

The conflict of authorities on the question at issue is quite interesting. In the States of California, Kansas, Florida, Virgina, Mississippi and Nebraska the courts, in construing statutes similar to this one, hold that provisions relating to the time of filing the oath or a bond are as mandatory as the provisions relating to the fact of filing; and that the statute is self-executing, so that an omission to file the oath or a bond within the exact period causes a vacancy of the office without an adjudication by the court.

But in the States of Illinois, Missouri, Indiana, New Jersey, Alabama, Oregon, Louisiana and Washington the courts hold that

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the provision relating to the *fact* of filing is mandatory, but that the provision relating to the *time* of filing is only directory; and, consequently, that the omission of exact compliance respecting time does not cause, *ipso facto,* a vacancy, but only constitutes a legal basis of defeasibility for judicial action, and, consequently, that a vacancy occurs only after the judgment of a court, in an appropriate action brought against the officer, has declared that he has forfeited the office. State of Washington ex rel. Lysons v. Ruff, 16 L. R. A. 140; State of Nebraska ex rel. Berge v. Lansing, 35 id. 124.

The current of authority in this State accords with this latter view. This view is expressed by Judge Merwin in People ex rel. Brooks v. Watts, 73 Hun, 404, and in cases therein cited.

Mechem on Public Officers lays down the general doctrine as follows: "Failure to give a bond within the time prescribed does not work a forfeiture, even though a statute expressly provides that upon the failure to give the bond within the time prescribed the office shall be deemed vacant, and may be filled by appointment."

This doctrine is cited with approval by Judge Hoyt in State of Washington ex rel. Lysons v. Ruff, *supra.* In Cawley v. People, 95 Ill. 249, it is held that this rule prevails where the statute provides that the person in default shall be "deemed to have refused" his office, or that the office shall become vacant.

So a statute which says an "Office shall be deemed absolutely vacant" on failure to file a bond within a specified time, was held not to vacate the office, *ipso facto,* by such failure, but merely made such failure a cause of forfeiture through a judicial proceeding brought for that purpose. State v. Toomer, 7 Rich. L. 216.

In 1 Dillon on Municipal Corporations (4th ed.), section 214, it is said: "Statutes requiring an oath of office and bond are usually directory in their nature, and unless the failure to take the oath or give the bond by the time prescribed is expressly declared, *ipso facto,* to vacate the office, the oath may be taken or the bond given afterward if no vacancy has been declared." See, also, Matter of Taylor, 25 Abb. N. C. 143; Pryor v. City of Rochester, 57 App. Div. 486.

It has also been held that a statute providing that a person shall "forfeit the office" to which he may have been elected by acting therein without having given the required bond, does not make the office vacant without a proceeding to declare it so, where such cause

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of forfeiture exists. Foot v. Stiles, 57 N. Y. 399; Cronin v. Stoddard, 97 id. 271.

Therefore, according to the current authority of this State and the weight of authority in other States, it must be held that, since the applicant took and filed his oath prior to the beginning of his official term and prior to the appointment of Mr. Taylor by the town board, the applicant did not forfeit his office by the technicality of his failure to act within the statutory period.

With respect to the objection that the applicant omitted to file his verified statement of election expenses within the statutory period, it is conceded that no forfeiture of the office existed in the absence of judicial action declaring it forfeited.

Since no vacancy existed when the town board made the appointment, it follows that its action was void, and that this motion must be granted. No costs are allowed.

Motion granted; no costs.

DENNIS DONOVAN, Plaintiff, *v.* THE CITY OF OSWEGO et al., Defendants.

(Supreme Court, Oswego Special Term, November, 1902.)

Municipal corporation — Front-foot rule of assessment — Consents of abutting owners as a charter condition precedent to a municipal improvement.

The front-foot rule of levying assessments for benefit from a street pavement should not be adopted by a city and cannot be sustained where the rule results in assessing suburban property, occupied mainly as a wood-yard, at a rate about twenty-four times greater than a business block in the heart of the city, and such a result is particularly objectionable where the city charter requires the expense of local improvements to be "assessed on each piece of property apportioned as equitably as may be."

Where the city charter forbids the common council from laying gas or water mains or pipes without first obtaining and filing with the city clerk the consents of at least one-half of the owners of abutting property, the assessment of an owner for connecting his property with such mains or pipes, where the same have been laid without compliance with the above provision, is illegal.

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THIS action is brought for the purpose of vacating two assessments, one for $18,482.91 for the construction of an asphalt pavement, and the other for $2,310.97 for the construction of water and gas connections and lateral sewers, and to enjoin the defendants from selling the plaintiff's property for the nonpayment of his alleged proportion thereof.

Brownell, Oot & Snow, for plaintiff.

Frank E. Hamilton, for defendants.

WRIGHT, J. The pavement for which the assessment of $18,482.91 was made, extends along East Bridge street, from East First street, in the central business portion of the city, to East Ninth street, in the vicinity of the suburbs thereof. The lots bordering said pavement varied greatly in value by reason of difference in location, depth, buildings and other improvements thereon. Many of the lots were vacant. The board of assessors made the assessment against the several lots abutting on the street, according to front footage regardless of their respective values, improvements and location, and without considering the special benefits accruing from said pavement to the several owners respectively.

It is urged by the defendants' counsel that the assessors did consider the values, improvements and location, but it is evident from the proofs that they did not. The front footage rule, as applied to this particular case, was erroneous, and resulted in assessments greatly disproportionate to the values of the respective lots and to the special benefits conferred thereon by the improvement.

It appears by the testimony that the plaintiff's property was worth, before the pavement, $1,700, and was assessed at that sum, and, after laying the pavement it was worth, and was assessed at, the same figure.

The larger part of the plaintiff's assessed land is a wood yard located in the block between East Eighth and Ninth streets, a considerable distance from the business center, and near the eastern limits of the improved part of the city. That block has a frontage of 200 feet, one-half of which belongs to the plaintiff. The block in the year 1898 had an assessed valuation of $3,000. The assessment in question against it is $1,179.88, one-half thereof against the plaintiff's land.

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In the same year the total assessed valuation of the property on the south side of Bridge street, between East First and East Second streets of 200 feet frontage, was $68,000. The assessment against it for this pavement is $1,100. Thus it appears that property at the suburbs worth $3,000 was taxed a larger sum than property in the business center worth $68,000, the ratio against the suburbs property being over twenty-four times greater than the ratio against the business block. A like inequality exists respecting the assessments of many other lots.

This enormous disproportion in the assessments was due to the practical application of assessing under the rule adopted. Assessments according to frontage is a convenient rule, and is proper respecting properties of substantially equal values. But in this case where the properties are greatly unequal, it has resulted in a correspondingly great disproportion among those bearing the burden of the expense of this pavement.

In the case of People ex rel. Oakwood Cemetery Association v. City of Syracuse, 59 App. Div. 626; affirmed in the Court of Appeals, 168 N. Y. 644, the assessors adopted the per foot frontage rule in making an assessment for the construction of a sewer extending through Salina street, from the business part of the city south to the suburbs. The plaintiff's cemetery land and a farm owned by another party were assessed on the same ratio per front foot as the business blocks. The trial court vacated the assessment, and the decision was affirmed by the Appellate Division and by the Court of Appeals.

In Matter of Klock, 30 App. Div. 29, Judge Herrick says: "The foot frontage rule 'is the imposition of a tax upon special lands without reference to benefits conferred upon such lands. As a mode of assessment it is purely arbitrary.' * * * Two lots with equal fronts, the one containing double the number of square feet contained in the other, are benefited in different degrees. This rule taxes them alike. This rule also ignores the value of the land benefited. Two different lots, with the same width of front, may differ greatly in value owing to a difference in location, or other causes, and, hence, be benefited in different degrees."

It is argued, however, that these vacant properties may, in the future, be improved and thus enhanced in value. But such problematical and uncertain contingencies should not ordinarily

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be considered, although special instances may exist where that would be proper, as when a building is in process of erection. But the general rule is laid down further on by Judge Herrick, in his opinion, as follows: "In assessing the expenses of street improvements upon the property benefited the general rule is to consider the effect of the improvement upon the market value of the property and to make the assessment in view of that fact without regard to the present use or the purpose of the owner in relation to future enjoyment. That principle makes it necessary that the assessors should take into consideration the value of the property, and it necessarily follows that they must take into consideration the question whether property is vacant or improved, and, if improved, the extent and value of such improvements."

In Elwood v. City of Rochester, 43 Hun, 102, Judge Smith, in his opinion respecting the proper method of making assessment for public improvements, says: "The general rule for determining the amount of benefit is a simple one. It is to ascertain the value of the property, with the improvement, and without it. The excess of the value with the improvement, over the value without it, is the amount of the benefit. And in estimating the value of each lot regard should be had to the buildings and other improvements upon it."

The reason of this rule is stated by the United States Supreme Court in Norwood v. Baker, 172 U. S. 278, as follows: "The principle underlying special assessments to meet the costs of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. * * * In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation."

It, therefore, appears from reason and authority that the rule adopted by the board of assessors in this case was erroneous in law, besides being violative of section 250 of the charter (L. 1895, ch. 394), which requires that the expense of local improvements shall be "assessed on each piece of property apportioned as equitably as may be," and it resulted in assessments greatly disproportionate to the respective values of the lots and the special

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benefits conferred thereon respectively; and, owing to the adoption of said rule the amount assessed against the plaintiff's land was grossly excessive as compared with the assessment on other property, and was unfair, inequitable and unjust. The assessment should, therefore, be vacated as to this plaintiff.

We now come to the consideration of the second assessment laid in the year 1899, for water and gas connections and lateral sewers constructed in front of the several lots and connecting them with the mains in said street. Three water connections and three gas connections were constructed in front of the plaintiff's vacant lot against his objection, except as to one water connection, and with that one exception were of no use to his property, and he was assessed seventy-five dollars and fifty cents therefor.

The charter contained no provision authorizing the laying of said connections by the city for private property, except as contained in section 44, which reads as follows: "The common council shall not have power and is hereby forbidden to grant permission to any person, company or corporation to lay or place in, upon or under, or incumber in any manner any of the streets, alleys or highways of the city with a railroad track, spur or branch, telegraph, telephone or electric poles, wires or other apparatus or appliances, or gas or water mains or pipes, or any other matter whatsoever, without and until the legal consent in writing, duly acknowledged, of at least one-half of the owners of abutting property shall have been first obtained and filed with the city clerk."

According to the above section the city is properly and justly restrained from the exercise of arbitrary power to compel people to equip their premises with water or gas connections, and such power can only be exercised when the owners of half of the property liable to assessments have given their written and duly acknowledged consents therefor.

No consents of the owners of the abutting property in writing, for the construction as required by the above section, were given by the owners of the abutting property; but, notwithstanding the lack of such consents, the department of works, by resolution, requested the Warren-Scharf Pavement Company to construct the connections, which was accordingly done, at the time the pavement was laid.

Obtaining the necessary consents in writing, duly acknowledged

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under said section 44, was a fundamental prerequisite to the validity of a resolution ordering the construction of said water and gas connections and lateral sewers between the mains in the street and the premises abutting thereon, and the construction thereof without the same renders the resolution void. Jex v. Mayor, 103 N. Y. 536.

The Jex case was brought to set aside an assessment for the costs of a pavement on the ground that a petition therefor had not been executed by a majority of the property-owners, as required by the charter. Judge Andrews, in delivering the opinion of the Court of Appeals in that case, says: "The presentation of the proper petition is the basis of the jurisdiction of the common council to incur an expense for repaving reimbursable by local assessment. The statute requiring the presentation of a petition was designed for the protection of property-owners. The initiation of the improvement without a petition was not an irregularity merely, but was a fundamental error. It was a condition precedent to the right to make an assessment for the improvement, that it should have been petitioned for by the requisite number of property-owners."

It, therefore, appears that making this assessment for the water and gas connections, without obtaining the proper consents therefor, was illegal.

For the above reasons the above assessments are invalid and must be vacated as to this plaintiff.

Findings and judgment may be prepared accordingly.

Judgment accordingly.

HANNAH PHILLIPS, Respondent, *v.* THE UNITED STATES GRAND LODGE OF THE INDEPENDENT ORDER SONS OF BENJAMIN, Appellant.

(Supreme Court, Appellate Term, November, 1902.)

Benefit society — Constitution — Failure to suspend a member in default.

Where the constitution of a benevolent order provides that if at the time of his death a member is indebted to his lodge in a sum equal to six months' dues and assessments, or either, his widow shall not be entitled to any endowment, she cannot, where he died

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so indebted, recover any death benefit of the grand lodge, and this irrespective of the question whether his lodge had complied with a further clause of the said constitution providing for the suspension, upon notice, of a member so indebted and the striking of his name from the roll.

APPEAL from a reversal by the General Term of the City Court of the city of New York of a judgment, entered upon a verdict, in favor of the defendant.

Mitchel Levy, for appellant.

A. B. Jaworower, for respondent.

MACLEAN, J. A relict seeking to recover from a fraternal benevolent association an endowment or death benefit upon the demise of her late husband, sometime a member of the defendant, alleges that the deceased, during his lifetime and membership, duly performed all the conditions required on his part to be performed. These allegations are denied in the answer, wherein also are pleaded, as a separate and distinct defense, that it was provided by the association's constitution, whereunder only the endowment can be claimed, that in the event of a member being indebted to his lodge at his death in a sum equal to six months' dues and assessments or either his widow shall not be entitled to any endowment, and that the decedent was so indebted; further, that when a member is indebted to his lodge in a sum equal to six months' dues or assessments or either he shall be stricken from the roll, with certain requirements of notice, and forfeit all benefits and endowments, and that the deceased was so stricken from the roll, and, furthermore, that all claimants must attend before a committee upon request, give full proof of the correctness of their claims and prosecute the same according to regulations of the association and that this and these things the plaintiff had failed to do and respect. Evidence was given for the defendant in support of each of its affirmative defenses. No evidence was offered by the plaintiff to sustain her allegations of performance. The issue was submitted to the jury by the learned justice who charged: "The simple question in this case for you to determine is, did the defendant in this action send the notice required by its constitu-

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tion. If it did then your verdict must be for the defendant. If not, your verdict must be for the plaintiff." The jury found for the defendant. The judgment entered upon the verdict has been reversed by the General Term, holding that the only question to be determined is was the deceased properly notified before his suspension and that therein the defendant has wholly failed.

However faulty was the proof that the deceased had been suspended with due formality and his name stricken from the roll upon proper notice, it was proven without contradiction that the decedent, at the time of his death, was indebted to his lodge for two quarters in a sum equal to six months' dues and assessments.

This fact may not have escaped the consideration of the jury whose finding may have been based upon it and from whose consideration it could not be withdrawn in the manner of the charge. This fact, although it does not appear to have been called to the attention of the court at Trial Term or to have been urged before the General Term, is now pressed here, and so remaining a hindrance to the plaintiff's recovery, the order of the General Term should be reversed and the judgment entered upon the verdict should stand.

The order of the General Term is reversed and the judgment of the Trial Term affirmed, with costs to the appellant.

FREEDMAN, P. J. (concurring). I concur with Mr. Justice MacLean in the reversal of the order of the General Term of the City Court and for the affirmance of the judgment entered upon the verdict of the jury in the Trial Term of the City Court, for the following reasons: The husband of the plaintiff herein having been, at the time of his death, indebted to his lodge for two quarters, in a sum equal to six months' dues and assessments, was barred under section 12, article 1 of part 3 of the constitution, from claiming the endowment or benefit sued for. That section applies to the grand lodge, the defendant in this action, and it is not inconsistent with section 1 of article 9 of part 4 of the constitution which applies to subordinate lodges. Irrespective, therefore, of the question of suspension upon proper notice which might arise if the latter section was applicable, the defendant under the section first referred to was entitled to the direction of a verdict as moved for, and consequently the reversal of the judgment, based upon the verdict of the jury, was erroneous.

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The order of the General Term must be reversed and the judgment entered upon the verdict of the jury affirmed, with costs.

GILDERSLEEVE, J., concurs in result.

Order reversed and judgment entered upon verdict affirmed, with costs.

SOLOMAN DAVIS et al., Appellants, *v.* WILLIAM H. BINGHAM et al., Respondents.

(Supreme Court, Appellate Term, November, 1902.)

Contract — Mere recital of a seal — Executed parol modification.

If in fact no seal has ever been affixed to an instrument it is not made a sealed instrument by a recital therein that the parties thereto have set their hands and seals to it.

Where such an instrument has been modified by parol and has been executed as modified the contractor may recover upon it as modified.

APPEAL by plaintiffs from a judgment of the General Term of the City Court of the city of New York, affirming a judgment for costs in favor of the defendants, entered upon the verdict of a jury.

Hugo S. Mark (B. Lewinson and Max J. Kohler, of counsel), for appellants.

William P. Maloney, for respondents.

FREEDMAN, P. J. This action was brought by the plaintiffs as copartners to recover a balance of $500 claimed to be due upon a modified contract to construct an electrical lighting plant in a building of the defendants. The defendants, by their answer, denied the modifications of the contract pleaded by the plaintiffs, but admitted that certain modifications were made which, according to the evidence at the trial, corresponded in the particulars to which they referred with some as claimed by the plaintiffs, and they pleaded nonperformance of the contract and counterclaimed

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for money which they alleged they paid the plaintiffs over and above the reasonable value of the work done. The counterclaim was put in issue by a reply.

At the trial and upon this appeal the defendants insisted that the contract was under seal and, therefore, not modifiable by parol. But the production of the original contract showed that, although it recited that the parties had thereunder set their hands and seals, no seal in fact had ever been affixed. A mere recital of a seal is no substitute for one never affixed. 21 Am. & Eng. Ency. of Law (1st ed.), 898. Moreover even in the case of a sealed instrument the authorities are to the effect that an *executed* parol modification is valid and enforcible. McCreery v. Day, 119 N. Y. 1. As to the modifications claimed the plaintiffs rely upon a letter written by them to the defendants confirming a prior conversation and specifying the particulars as to which the specifications of the original contract would be departed from, and then they claim that the defendants silently acquiesced and that they, the plaintiffs, performed the contract as thus modified without protest by the defendants. Broadly stated it may be said that the modifications thus proposed and acquiesced in consisted in the substitution of a two-wire for a three-wire system in the construction of the electrical lighting plant. But the plaintiffs wholly failed to show, and even now do not claim that it was also agreed that the price should remain as fixed by the original contract. That being so, and the change in the work being a substantial one, the plaintiffs, under the circumstances disclosed, could recover only the reasonable value of the work actually done and such reasonable value was to be determined in the light of the price fixed by the original contract for the work to be done under it. The consequence is that in the aspect of the case most favorable to the plaintiffs, namely, that the contract was modified as claimed by them, that they performed it as modified, and that the defendants acquiesced in such performance, the only substantial question to be determined by the jury was the difference between the value of the two-wire and the value of the three-wire system. Upon that point the testimony took a wide range. One of the plaintiffs testified that by the substitution of the two-wire system for the three-wire system the defendants were benefited to the amount of $4.72; an expert called by the plaintiffs said that the defendants were injured to the amount of $30, and an expert called by the

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defendants testified that they were injured to the amount of $1,000. The question was fully and fairly submitted to the jury and they found a difference of $500 in favor of the defendants, which wiped out the claim of the plaintiffs for the balance sued for. Upon the whole case it appears that substantial justice has been done and that none of the exceptions urged by the plaintiffs upon this appeal are tenable.

The judgment appealed from should be affirmed, with costs.

MacLean and Blanchard, JJ., concur.

Judgment affirmed, with costs.

Elizabeth Ranney, Respondent, *v.* The Bowery Savings Bank, Appellant.

(Supreme Court, Appellate Term, November, 1902.)

Savings bank — Rule, as to the method of making a gift of a deposit — Gift causa mortis — Affirmative defense.

A depositor of a savings bank is not bound by its rule, forbidding any gift of a deposit unless by an assignment or other transfer in writing signed by the depositor and duly acknowledged, where the rule was made after she became a depositor. Her agreement to another rule that all notices as to deposits or depositors, when published by placards in the bank, should be deemed and taken as personal notice to each depositor, although said rule as to gifts had been placarded in the bank for many years before her death, has not the retroactive effect of binding her to the first above rule.

Accordingly, a donee *causa mortis* of the depositor, in possession of the bank book by delivery from the depositor, was allowed to recover the deposit of the bank.

Semble, that if the first above rule were in any manner available to the bank as a defense it would be matter of confession and avoidance, not available when not pleaded as an affirmative defense.

Appeal by the defendant from a judgment and order of the General Term of the City Court of the city of New York, affirming a judgment in favor of the plaintiff, entered upon the verdict of a jury, and also affirming order denying defendant's motion for a new trial.

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Cowing & White (Robert Goeller, of counsel), for appellant.

Fromme Brothers (James A. Douglas, of counsel), for respondent.

FREEDMAN, P. J. The plaintiff's claim against the defendant bank is based on an alleged gift *causa mortis* of a certain sum deposited in the bank by her mother. At the trial evidence was given by and on behalf of the plaintiff which is relied upon as establishing the said gift and the delivery of the pass-book representing the sum deposited. Although the policy of the law is against the encouragement of gifts of this nature, we feel bound to say, upon a close scrutiny of the whole case, that the evidence was sufficient to carry the case to the jury; that the issues were fairly submitted, and that the verdict of the jury should not be disturbed, unless the contract of plaintiff's mother with the bank precluded her from making the gift in the manner she did.

The bank insists that the gift was invalid against it because not made by a writing duly signed and acknowledged as required by rule 14 of its rules and regulations, which is as follows: "14. No gift of any kind shall be made of the whole or any part of the amount due a depositor, unless by an assignment or other transfer in writing signed by the depositor and duly acknowledged or proved before an officer authorized to take such acknowledgment or proof."

This rule was adopted in the year 1891, whereas the account of plaintiff's mother, as a depositor in the bank, was opened March 7, 1888. The pass-book issued to her by the bank at that time, and the signature-book in which she subscribed the by-laws and regulations of the bank and agreed to be bound by them, had printed in them a number of rules and regulations, and one of them was to the effect that all notices in relation to the deposits or depositors published by direction of the trustees in one or more of the daily newspapers of this city, or by placards in the bank, should be deemed and taken as personal notice to each depositor.

By force of this rule or regulation and the further fact that rule 14, as above stated, when adopted in 1891, was hung up by placards in the bank, it is claimed that the deposit of plaintiff's mother, though made years before, became subject to the operation

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of rule 14, although said rule was not contained in her pass-book nor subscribed by her at the time she made the deposit.

There are two answers to this contention.

In the first place, although every savings bank has authority to make and publish reasonable regulations concerning the repayment of money to a depositor which, if assented to by a depositor, become part of the condition upon which the bank receives the deposit, the power must be exercised in a reasonable manner and in conformity with the statutes of this State. In 1888, when plaintiff's mother opened her account, section 257 of chapter 409 of the Laws of 1882 was in force, and that provided that the regulations of the bank for the repayment of deposits to depositors "shall be put in some conspicuous place in the room where the business of such corporation shall be transacted, and shall be printed in the pass-books or other evidence of deposit furnished by the corporations, and shall be evidence between the corporation and the depositors holding the same, of the terms upon which the deposits therein acknowledged are made," etc.

The same provision was incorporated into the Banking Law of 1892. Laws of 1892, chap. 689, § 113.

This provision makes it impossible for the bank to totally avoid its obligation to one having a complete title to the fund and the actual possession of the pass-book, etc., to repay the amount deposited according to the rules and regulations printed in a depositor's pass-book, by a rule or regulation adopted subsequently, and it would be unreasonable to hold that the mere placarding of the subsequent rule or regulation has the retroactive effect contended for by the bank.

In the second place, the defense sought to be maintained under rule 14, as above stated, was not pleaded, and being matter of confession and avoidance is not available to the defendant unless pleaded as an affirmative defense.

The only affirmative defense set up in the answer was that certain parties other than the plaintiff claimed the said fund, and that said claimants should be made parties to this action, and that the bank has been, and is, at all times ready and willing to pay over the said fund to the party or parties entitled thereto. But no names or particulars were given. The matter thus pleaded constituted no defense. If the facts were as alleged, the bank should have taken steps to have such claimants brought in if possible.

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Moreover the bank could have protected itself, and, perhaps, did so, by notifying such claimants of the pendency of the present suit and calling upon them to defend the same.

For the foregoing reasons none of the exceptions taken by the defendant as set forth in the record, constitutes ground for reversal.

The judgment and order must be affirmed, with costs.

MacLean and Blanchard, JJ., concur.

Judgment and order affirmed, with costs.

CHARLES HAAS, Appellant, *v.* JACOB A. ZIMMERMANN, Impleaded, Etc., Respondent.

(Supreme Court, Appellate Term, November, 1902.)

Evidence — Party cannot contradict his own witness, also a party, where he is uncontradicted.

A party calling a witness asserts his credibility and therefore where a defendant calls another defendant whose credibility, had he testified for the plaintiff, would have been for the jury, the defendant, calling the witness, is bound by his testimony where it is uncontradicted.

APPEAL by plaintiff from a judgment and order of the General Term of the City Court of the city of New York, affirming a judgment in favor of the defendant Jacob A. Zimmermann, entered upon the verdict of a jury.

Max Silverstein (Charles C. Peters, of counsel), for appellant.

John P. Everett, for respondent.

FREEDMAN, P. J. The action is brought to recover the sum of $400, the amount of a check made by the defendant Zimmermann to the order of the defendant Uhlfelder, delivered by Zimmermann to Uhlfelder, and by the latter indorsed over and delivered to the plaintiff for value. The defendant Zimmermann alone answered. His answer admits the making of the check, its presentment at the bank and the nonpayment thereof, but it denies the indorsement to the plaintiff for value, and then sets up an affirmative defense that

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the check was delivered to Uhlfelder as security for the performance of certain work by Zimmermann, upon the completion of which work the check was to be returned, that the said work was duly completed and that the plaintiff had notice of the conditions upon which the check was delivered.

At the trial both parties gave evidence, and at the close of the evidence the plaintiff moved for a direction of a verdict for the amount of the check. The motion was denied and the plaintiff duly excepted. The case was thereupon submitted to the jury who found for the defendant. Upon full examination of the case it clearly appears that the plaintiff was entitled, as a matter of law, to the direction of a verdict in his favor. Even if there was a diversion of the check by Uhlfelder, the plaintiff showed that he had no notice and that he gave full value for the check by paying to Uhlfelder, upon the faith thereof, $370 in cash and canceling an indebtedness of $32, which was reduced to $30. The testimony of the defendant himself simply established a diversion. The defendant then called as a witness the defendant Uhlfelder, but he fully corroborated the testimony of the plaintiff upon the point that the plaintiff was a *bona fide* holder for value and without notice. The defendant then called as a witness one Abraham Weinberg who was present at the time the plaintiff took the check, but he also corroborated the testimony of the plaintiff. There is absolutely no testimony in the case contradicting that of the plaintiff and of the witnesses Uhlfelder and Weinberg, and consequently their testimony to the effect that the plaintiff was a *bona fide* holder for full value and without notice should have been accepted by the court as true and a verdict should have been directed for the plaintiff. True, it is elementary that the testimony of a party, when given in his own behalf, is not conclusive even when uncontradicted. The credibility of such party is for the jury. But it is also elementary that a party calling a witness asserts his credibility; therefore, when a party calls a witness whose credibility, had he testified for the opposing party, would have been for the jury, he is bound by the testimony of such a witness where it is uncontradicted. He cannot be heard to assert that his own witness is not worthy of credit. Hunt v. Fish, 4 Barb. 324; Tilden v. Aitkin, 37 App. Div. 28; Hankinson v. Vantine, 152 N. Y. 20.

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The further facts which incidentally appeared in the course of the testimony of the plaintiff and of Uhlfelder and which also remained wholly uncontradicted, to the effect that the plaintiff, not having a bank account, when told by the paying teller of defendant's bank to deposit the check, gave the check to Uhlfelder for collection without receiving anything for it; that Uhlfelder attempted to collect it through his bank and that, not being able to do so, because defendant's bank objected to the correctness of defendant's signature, he returned it to the plaintiff who has had it ever since, are not, upon the whole case, sufficient suspicious circumstances to deprive the plaintiff of the benefit of the rule as above stated.

The judgment and order must be reversed and a new trial ordered, with costs to the appellant to abide the event.

MacLean and Blanchard, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

Russell & Co., Appellant, *v.* Frank McSwegan and Frank McSwegan, Jr., Respondents.

(Supreme Court, Appellate Term, November, 1902.)

Discovery.

Defendants should not be allowed a discovery and inspection of the plaintiff's books, in order to support their counterclaim, where they do not show that the books contain the entries they wish, and where, although asserting sources of information, they do not excuse their failure in not having obtained the information from the alleged informants.

Appeal by the plaintiff from an order of the General Term of the City Court of the city of New York, affirming an order of a justice of that court, directing the plaintiff to furnish copies of certain entries in or produce its books of account for inspection of the defendants.

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William A. Ulman (George S. Hebabian, of counsel), for appellant.

John S. Davenport, for respondents.

MacLean, J. In their answer in an action upon a promissory note, the defendants set up, by way of counterclaim, an agreement, whereby they were to receive a discount of thirty per cent. from the list price, upon all sales of plaintiff's engines upon demand from a certain territory, and alleged that "the plaintiff had sold upon demand and inquiry from the territory aforesaid, a larger number of said engines, upon which, pursuant to the agreement hereinbefore set forth, the defendants became and were entitled to receive from the plaintiff the discount of thirty per cent. from the list prices of the engines so sold to the amount of thirteen thousand one hundred and twenty-seven dollars." None of the allegations of the counterclaim was upon information and belief but made positively and verified as of personal knowledge. Within four days of the day set for the trial of the cause, the defendants obtained an order to show cause why they should not be furnished a sworn copy of the entries in the plaintiff's books. The motion was denied after a hearing. Then the defendants applied again and successfully. Under the ruling in Pots v. Herman, 7 Misc. Rep. 4, the order ought not to have been granted, for facts justifying the order were not before the court. There is nothing to show that the books contained the entries as to the matters of which inspection or discovery was sought. In the first petition, it was asserted that the defendants had learned of one engine sold by the plaintiff in Greater New York, but not of the terms and exact date of sale; and had also learned of other sales of engines in the district aforesaid, the exact terms and locations of which the petitioners are unable to explain. In the petition and in an affidavit of one of the defendants supporting it, there were also assertions of information, but wherever the source of the alleged information is stated, no sufficient excuse is given for not obtaining it from the informant, the nearest to such excuse being as to one Barber "not now within the State." Convenient it might be for the defendants to have the items of their counterclaim, if they be entitled to any, proven for them, but the plaintiff may not be constrained thereto upon their assertion of necessity,

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unless supported by a different showing of facts — not to mention their contradiction by the defendants' own pleading upon personal knowledge. This application, is not within the doctrine of Brigham v. Zaiss, 48 App. Div. 144.

The order appealed from should be reversed.

FREEDMAN, P. J., and BLANCHARD, J., concur.

Order of General Term of City Court reversed, with costs to appellant.

SIGMUND LEINHARDT, Respondent, *v.* DORA KALCHHEIM, Appellant.

(Supreme Court, Appellate Term, November, 1902.)

Marketable title — Cloud.

A written agreement, between owners, named Hilkemeyer and Sternkopf, of lots which adjoin, binding them, their personal representatives and heirs, declared therein to be one which "shall at all times be construed as a covenant running with the land," limiting the depth to which foundations may be sunk on their respective lots at the line dividing them, and binding Hilkemeyer should he go deeper to protect at his own expense Sternkopf's wall, is, whatever may be its precise legal nature, such a cloud upon the title of Hilkemeyer that a purchaser from one claiming under him should not be required to complete and particularly where Sternkopf is not before the court.

APPEAL by the defendant from a judgment and order of affirmance by the General Term of the City Court of the city of New York, of a judgment, entered upon the verdict of a jury directed.

Jacob Levy, for appellant.

Jacob Rieger (Joseph Gans, of counsel), for respondent.

MACLEAN, J. In his action to recover downpayment and expenses, upon a contract for the purchase of real property of the defendant, the plaintiff claimed the right to reject, as he did on the day fixed for the closing of title, the deed therefor tendered by the defendant, on the ground that the property was incumbered and burdened, and discovered so to be only by search. The burden

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was a recorded agreement between one Hilkemeyer, of the first part, from and through whom is derived the title of the defendant, and one Sternkopf, of the second part, which reads:

"WHEREAS, the foundations of the building of the party of the first part extends but nine feet in depth below the level of the curb, and should the party of the first part build his said new building with foundations extending ten feet below the curb, to underpier the foundations of the said house, and shore up the sidewalls of the building of the party of the first part thereby causing considerable expense and inconvenience to the party of the first part; and,

"WHEREAS, in order to avoid said expense and inconvenience the parties to these presents have agreed as hereinafter mentioned.

"NOW, THEREFORE, this agreement witnesseth: The party of the second part, in consideration of the sum of one hundred and fifty ($150) dollars to him to be duly paid, hereby agrees that in erecting the proposed building on his said lot of land, he will not build the foundations thereof any deeper below the level of the curb of the street than the depth of the foundations of the westerly wall of the building of the party of the first part. In consideration thereof the party of the first part agrees to pay said sum of one hundred and fifty ($150) dollars to the party of the second part, and he also agrees for himself, his heirs, executors, administrators and assigns to and with the said party of the second part, his heirs, executors, administrators and assigns, that neither he the said party of the first part, his heirs, executors, administrators or assigns, will at any time hereafter in case he or they should erect another building on the lot of the party of the first part in the place and stead of the present building now thereon, build a foundation of the said new building any deeper below the level of the curb of the street than the foundations of the building of the party of the second part about to be erected by him, but in case he or they should build the foundations deeper than the foundations of the building of the party of the second part, he or they agree that they will properly underpin, shore up and protect the wall of the building of the party of the second part at their own costs and expense. It is understood and agreed that this agreement shall bind the heirs, executors, and administrators of the respective parties and shall at all times be construed as a covenant running with the land."

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This was but a personal covenant and one that did not run with the land, contends and contended the attorney for the defendant, and urges that a direction of a verdict in favor of the plaintiff, and all sustainment thereof by the court below was error. As remarked in Mott v. Oppenheimer, 135 N. Y. 312, 319: "The question whether a contract having relation to lands is personal, or whether it constitutes a charge upon the lands, obviously, must be determined by a consideration of the expressed intentions of the parties and of the existence of any interest in the land raised by force of its covenants." This agreement, the parties have expressly declared, "shall at all times be construed as a covenant running with the land," therein and thereby evincing an intention to charge the land, notwithstanding failure to create such a covenant as they have determined in consequence of the absence of privity of estate. There was, however, the imposition of mutual restrictions upon the premises of each and the purchase and sale of a right, "sometimes called an amenity," chargeable upon the premises of the contracting parties, without regard to privity of estate or community of interest. Trustees v. Lynch, 70 N. Y. 440. Whether a covenant running with the land, or a right as above suggested, or a mere personal covenant, there is a question of law of sufficient import, even of doubt, as to cast a shadow upon the title of the purchaser, if he be compelled to take, and leave him in doubt and unrelieved, particularly in the absence of him in whom the outstanding right is vested (Brokaw v. Duffy, 165 N. Y. 391), and so the judgment of the court below may well stand.

Judgment and order of the General Term of the City Court affirmed, with costs.

FREEDMAN, P. J., and BLANCHARD, J., concur.

Judgment and order affirmed, with costs.

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THE IDEAL CASH REGISTER CO., Appellant, *v.* FRANK ZUNINO, Respondent.

(Supreme Court, Appellate Term, November, 1902.)

Sale — Condition precedent of payment — Damages on vendee's refusal to accept the goods.

Under an executory contract for the sale and purchase of goods at a fixed price, also stipulating that title shall remain in the vendor until full payment of the price or payment of a judgment recovered therefor, the vendor may, where the vendee refuses even to accept the goods, recover of him the balance unpaid of the price and is not limited to damages in the difference between the price and the market value of the goods.

Under such a contract the vendor retains title and possession of the goods until full payment of the price or payment of a judgment recovered therefor, but upon payment both title and possession pass to the vendee.

APPEAL from a judgment and order of the General Term of the City Court of the city of New York, affirming a judgment, rendered at a Trial Term of said court.

Otis & Pressinger (A. Walker Otis, of counsel), for appellant.

Wentworth, Lowenstein & Stern (Edwin F. Stern, of counsel), for respondent.

BLANCHARD, J. The terms of the contract between the parties, so far as they are material to the questions raised on this appeal, are embraced in the following order of the defendant, which was accepted by the plaintiff:

"*To the Ideal Cash Register Company:*

"Ship us two of your No. 1 registers. This register to be placed on the back counter, saloon business. On the fulfillment of the above we agree to pay you two hundred and fifty dollars ($250.00), viz., one hundred and twenty-five dollars allowed for National

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register. Bal. $125.00 cash on delivery of register. It is expressly agreed that this order shall not be countermanded. It is agreed that the title to said cash register shall not pass until the purchase price, or any judgment for all or any part of the same, is paid in full, and the register shall remain your property until that time.

"(Signed) FRANK ZUNINO."

After the execution and delivery of the contract and prior to July 1, 1901, the defendant notified the plaintiff that he would not carry out said agreement. On or about July 1, 1901, after the defendant's notice, the plaintiff tendered to the defendant the two cash registers mentioned in the contract and demanded payment of the sum of $125, balance due thereon. The defendant refused to pay said sum, or any part thereof, but conceded that the market value of the two cash registers when tendered was $250. The plaintiff claims that this fact is irrelevant and immaterial to the issues in the action.

This action is brought by the plaintiff to recover the unpaid balance of the contract price, namely, $125, and interest thereon. The defendant contends that the plaintiff has mistaken its remedy, and that the only action open to it is an action for damages, and that the measure of such damages is the difference between the market value and contract price of the registers at the time they were tendered, and that, as there is no such difference in this case, the plaintiff is entitled to recover in any event only nominal damages for the defendant's breach of the contract. The defendant's contention cannot be sustained.

The rule of damages upon the refusal of a buyer to complete his purchase under a contract for the sale and delivery of personal property at a fixed price has been clearly stated in Van Brocklen v. Smeallie, 140 N. Y. 70; citing Dustan v. McAndrew, 44 id. 78, and Hayden v. Demets, 53 id. 426, as follows: "The vendor of personal property has three remedies against the vendee in default. The seller may store the property for the buyer and sue for the purchase price; or may sell the property as agent for the vendee and recover the deficiency resulting; or may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery. In the second of the decisions last cited (Hayden v. Demets), it

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was further held that the rule applied, not only to cases where the title passed at once, but also to cases where the contract was executory but there had been a valid tender and refusal." The rule thus stated has been reannounced in Moore v. Potter, 155 N. Y. 481, 486; Ackerman v. Rubens, 167 id. 405, 406; Gray v. Central R. R. Co., 82 Hun, 523, and Earle v. Robinson, 12 Misc. Rep. 536, 542.

The fact that by the terms of the contract the title to the cash registers is to remain in the plaintiff until the contract price, or a judgment therefor, is paid in full does not take this case out of the rule announced in Van Brocklen v. Smeallie, for the plaintiff has elected to bring its action for the purchase price and must, therefore, continue to hold the cash registers for delivery to the defendant as the absolute owner thereof immediately upon payment of the contract price, or the amount of a judgment therefor, as provided in the contract. Pending this the title in the plaintiff is a qualified one and is, so long as it shall insist upon full payment under the terms of the contract, merely the right to hold possession of the property as security for the judgment for the contract price. Brewer v. Ford, 54 Hun, 116. In any event, the plaintiff would have the title and right to possession of the property until payment therefor is made, irrespective of the title clause in this contract. Pierson v. Hoag, 47 Barb. 243; Hayden v. Demets, *supra;* Moore v. Potter, *supra.*

It would be entirely inconsistent to contend that the plaintiff cannot maintain this action for the contract price, because by the terms of the contract the title to the property sold is to remain in it pending payment, while conceding, as we must, that it could maintain such an action were there no such clause in the contract. The more reasonable view seems to be that in such a case as this the right to the possession of the property and the title to it are one and the same thing. The title, without the possession, would be worthless to either party, and nothing but a mere term. From this view of the case the title clause in this contract may be regarded as surplusage, and in no respect affecting the rights and liabilities of the parties. The defendant, with or without this clause, is entitled to the immediate possession and absolute title of the cash registers as soon as he pays the agreed price, or the amount of a judgment therefor. The plaintiff, with or without the title clause, has the right to possession of and the title to the prop-

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erty until the agreed price is paid. That the defendant has not the title and possession of the cash registers is due to his own default entirely. If further citation of authority be deemed essential to support the conclusions above expressed, reference may be had to the quite recent decision in Gray v. Booth, 64 App. Div. 231, which seems decisive on the point raised on this appeal. We fully approve the views therein expressed.

It may be said in the case at bar, as in Van Brocklen v. Smeallie, *supra*, "He (the defendant) defiantly broke his contract and with some natural triumph stands ready to pay the six cents. That is not enough."

The order appealed from should be reversed, with costs, and the judgment of the Trial Term of the City Court and the order of the Special Term affirmed, with costs.

FREEDMAN, P. J., and MACLEAN, J., concur.

Order reversed, with costs, and judgment of Trial Term and order of Special Term affirmed, with costs.

MORRIS HONIGSTEIN, Respondent, *v.* WILLIAM S. HOLLINGSWORTH et al., Appellants.

(Supreme Court, Appellate Term, November, 1902.)

Master and servant — Wrongful discharge — When the reasonableness of a rule of the master is a question of law only.

Where an employer defends his employee's action for an alleged wrongful discharge by answering that he had disobeyed orders, the court alone must decide whether it was reasonable for the employer to make a rule, for violation of which the employee was discharged, forbidding any smoking of cigars or cigarettes in a part of the employer's factory where inflammable substances were in constant use.

Upon such facts the submission of this question to the jury is an error requiring a reversal of a judgment which the employee had recovered.

Semble, that such a rule of the employer is reasonable.

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APPEAL from an order and judgment of the General Term of the City Court of the city of New York, affirming a judgment in favor of the plaintiff.

Blandy, Mooney & Shipman (Edmund L. Mooney and Frederick A. Card, of counsel), for appellants.

J. Rieger (Joseph Gans, of counsel), for respondent.

BLANCHARD, J. This is an appeal from an order and judgment of the General Term of the City Court of the city of New York, affirming a judgment in favor of the plaintiff.

The plaintiff sues to recover damages for an alleged wrongful discharge from the employment of defendants. The defendants set up as a defense the plaintiff's disobedience to orders. In connection with this, the trial justice charged the jury as follows: "These defendants had a right to make reasonable rules and regulations for the government of their factory and if one of those rules was that cigars or cigarettes should not be lit in this place, it will be for you to say if that was a reasonable regulation, in view of what was being manufactured there, of whether there was a breach of contract; not a breach once because if such a thing did occur and attention was called to it and obedience afterward rendered, it would cure the breach; but if the plaintiff persisted in so doing repeatedly, after being admonished that smoking cigars or cigarettes was not allowed inside this room, it will be for you to say whether that of itself justified his discharge, and in connection therewith you may consider all these other matters, in forming your opinion as to defendants' being justified in the discharge of the plaintiff."

To this part of the charge defendants excepted, and requested the justice to charge, "That, under the circumstances as proven in the case, the rule established against smoking was in itself a reasonable one." He refused so to charge and said: "I hardly think it is for the court to say what was or what was not reasonable. The jury have heard the testimony of the witnesses to the effect that inflammable substances, alcohol and things of that kind were constantly being used in defendants' place and it will be for the jury to say whether, in the light of these circumstances, the

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prohibition as to smoking was reasonable or not. The court will not pass upon that question arbitrarily."

To the refusal to so charge defendants duly excepted. Defendants' exception to the charge and their request to charge presented clearly to the court the question whether, as matter of law, under the facts proven and undisputed, the rule against smoking was reasonable so that if disobeyed it warranted plaintiff's discharge.

We have reached the conclusion that these exceptions present error calling for a reversal of the judgment. It was the duty of the court to say whether the directions of the employers were proper and reasonable. The jury should not have been permitted to pass upon the question. There can be no question concerning the fact that the defendants had a right to forbid the plaintiff, their employee, from smoking when about the inflammable materials contained in the defendants' place of business. This was a question of law, upon which the court should have instructed the jury and its failure so to do calls for a reversal of the judgment. Jerome v. Queen City Cycle Co., 163 N. Y. 351, 356; Gray v. Shepard, 147 id. 177, 182, and Forsyth v. McKinney, 56 Hun, 1.

The judgment should be reversed and a new trial ordered, with costs to the appellants, to abide the event.

FREEDMAN, P. J., and MACLEAN, J., concur.

Judgment reversed and new trial ordered, with costs to appellants, to abide event.

BENJAMIN FOHS, Respondent, *v.* ALEXANDER RAIN and THE AMERICAN SURETY CO. OF NEW YORK, Appellants.

(Supreme Court, Appellate Term, November, 1902.)

Principal and surety — Invalid levy on goods of a third person — Bond of a city marshal of Brooklyn where enforcible — Its validity.

A surety, of a marshal of the former city of Brooklyn, which has become bound for his faithful discharge of the duties of his office and in default thereof to pay all damages resulting from such default, is liable to a person where the marshal attaches and sells that person's property by virtue of process running against another person.

The marshal must be deemed to have been acting *colore officii*.

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The bond may be ordered prosecuted, against the surety and the marshal, continued in office by the charter of the city of New York, in the Municipal Court of said city, borough of Brooklyn, and the said charter (L. 1897, ch. 378, § 1428) does not limit prosecution to the County Court of Kings county.

The validity of the bond is not impaired by the facts that it was given before, while the breach thereunder arose after, January 1, 1898, when the said charter took effect.

APPEAL from a judgment, rendered in the Municipal Court of the city of New York, ninth district, borough of Manhattan, in favor of the plaintiff and against the defendants, for the sum of $519.20, damages and costs.

Henry C. Willcox, for appellants.

Uriah W. Tompkins, for respondent.

FREEDMAN, P. J. This action was brought on the 2d day of November, 1900, and prayed judgment against the American Surety Company, of New York, as surety upon a certain bond, dated July 15, 1897, executed unto the city of Brooklyn, and conditioned for the faithful performance of his duties by the defendant Alexander Rain, theretofore, pursuant to the provisions of chapter 1000 of the Laws of 1896, appointed a city marshal of said city of Brooklyn by a justice of the peace of that city. Said bond was filed in the office of the clerk of the county of Kings.

Briefly, the complaint alleges that on January 25, 1898, an action was commenced in the Municipal Court of the city of New York, first district, borough of Brooklyn, in which a warrant of attachment was issued by the Hon. Jacob Neu, a justice of said court, against the property of John W. Smith, defendant in that action; that such warrant of attachment was delivered to Alexander Rain, one of the defendants herein, who thereupon levied the same upon certain merchandise belonging to Benjamin Fohs, the plaintiff in this action, and wrongfully took possession thereof, and sold the same, and applied the proceeds thereof to the payment of the judgment thereafter obtained in the action against Smith; that judgment has been obtained by the plaintiff Fohs against the said Alexander Rain for damages sustained by reason

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of said unlawful taking and that thereon executions have been issued against said Alexander Rain, and have been returned unsatisfied; that application was made to Hon. William D. Dickey, one of the justices of the Supreme Court, in the second judicial department, sitting at chambers in the county of Kings on the 28th day of February, 1900, and that an order was on that day made by said justice, granting leave to the plaintiff to prosecute in the Municipal Court of the city of New York the bond of the marshal described in the complaint.

The appeal urges several grounds for the reversal of the judgment, but only three of those grounds are of consequence. The first is as to the construction of section 1428 of the Greater New York charter, which reads as follows: "Application for leave to prosecute the same (a marshal's bond) shall be made to a justice of the supreme court at chambers in the judicial department wherein the borough for which said marshal shall have been appointed is situated, * * * and such justice may order such bond to be prosecuted in the municipal court of The City of New York or in the city court of The City of New York if such borough be within the county of New York or in the county court of the county wherein such borough lies, if in any other county."

The construction sought to be put by the appellants upon this section is this: That the Municipal Court of the city of New York is not given jurisdiction of actions upon *all* bonds of marshals of the city of New York, but only such bonds given in the two boroughs (Manhattan and The Bronx) which "lie within the county of New York;" that where marshals are appointed within the other boroughs of the city of New York, leave to prosecute their bonds can be granted only by a "justice of the supreme court at chambers, in the judicial department wherein the borough for which such marshal shall have been appointed is situated;" that such bond must be prosecuted "in the county court of the county wherein such borough lies," and that the bond in the case at bar having been given for Rain, as a marshal, appointed for the borough of Brooklyn, and that borough lying in Kings county, the only court in which the plaintiff could be granted leave to sue was the County Court of the county of Kings.

This construction of said section is wrong. The section should be construed as reading that "such justice may order any such bond to be prosecuted in the municipal court of The City of New

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York," or that such bond may be ordered prosecuted in "the city court of The City of New York if such borough be within the county of New York," or that such bond may be prosecuted in "the county court of the county wherein such borough lies if in any other county."

The construction claimed by the appellants for the section would limit the prosecution of a marshal's bond in the borough of Brooklyn to the County Court of Kings county. It cannot be that the intent of the Legislature was to allow such bonds to be prosecuted in the Municipal Courts of the boroughs of Manhattan and The Bronx, and prohibit their being brought in such courts in the borough of Brooklyn. Such construction is unreasonable. Under the proper construction of said section, the order permitting the plaintiff herein to sue was properly granted, the city of New York now embracing the borough of Brooklyn, where said marshal was appointed, and where such application was made.

The next point is based upon the case of Matter of Schultes, 33 App. Div. 525, in which it was held that the Greater New York charter created a new court with distinct powers and jurisdiction, etc., and he argues, therefore, that the bond of the marshal in this case having been given July 15, 1897, and the cause of action having arisen thereunder January 26, 1898, and the city of Brooklyn, on January 1, 1898, having ceased to exist, and the office of justice of the peace therein, by whom the marshal in the case at bar was appointed, having been abolished, and the office of city marshal of the city of Brooklyn having been likewise abolished and succeeded by the office of city marshals of the city of New York, the bonds given by these latter officers being given unto the city of New York and not unto the city of Brooklyn, therefore, the obligation of the surety upon the bond is changed and the surety released.

The charter of Greater New York provided that the marshals of the city of Brooklyn should continue to hold such office and perform the duties thereof until a date specified (which was beyond the time the cause of action herein accrued).

It is true that this Appellate Term followed the decision in Matter of Schultes in several cases, as being the determination of a higher appellate tribunal, beginning with the case of Tyroler v. Gummersbach, 28 Misc. Rep. 151, but they did so with great reluctance, and finally the said determination was overruled by the

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decision of the Court of Appeals in the case of Worthington v. London Guarantee & Accident Co., 164 N. Y. 81. This decision effectually disposes of the appellants' position based upon the Matter of Schultes, *supra*.

Rain, one of the defendants herein, was appointed a marshal of the city of Brooklyn on July 15, 1897, for a period of four years. At the time of the consolidation of the city of Brooklyn with the city of New York, he continued as marshal, but under a different name, but no change in his duties or obligations which devolved upon him were made. The defendant, the surety company, cannot, therefore, avail itself of the defense that it discharged its bond by reason of a change of title of office of its principal, nor by reason of executing process out of a Municipal instead of a District Court. Board of Education v. Quick, 99 N. Y. 138; Levin v. Robie, 5 Misc. Rep. 529; 25 N. Y. Supp. 982; Freeland v. Robie, 5 Misc. Rep. 528; 25 N. Y. Supp. 986. Furthermore, the defendant, the surety company, in January, 1898, and before the cause of action herein accrued, received from the defendant Rain the annual premium upon the surety bond, thereby showing its intention to continue its suretyship.

The remaining point to be considered is whether the plaintiff has a cause of action against the defendant the American Surety Company.

The allegations in the complaint are simply these: A warrant of attachment was issued out of the Municipal Court against the property of John W. Smith, the same was delivered to Rain, the marshal, who, in violation of his duty, levied on property belonging to the plaintiff Fohs. This presents a more serious question and the decisions relating thereto would seem not to be entirely uniform. It will be seen, however, that most, if not all, turn upon the language used in the bonds under consideration in each case.

The bond in the case at bar reads as follows: "That the above bounden Alexander Rain shall faithfully discharge the duties of his said office as city marshal, and shall promptly account for and pay over all moneys and property received by him as such officer, in accordance with law, or in default thereof the parties executing this indemnity will pay all damages, costs and expenses resulting from such default, not exceeding the said sum of $5,000, then this obligation shall be void, otherwise to remain in full force," etc. The Court of Common Pleas in the case of Hauger v. Bernstein,

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7 Daly, 343, where the condition of the bond was that the marshal should "well and faithfully execute the duties of said office of marshal without fraud, oppression or deceit," held the sureties liable, where the marshal, by virtue of an attachment against the property of another person seized that of the plaintiff. To the same effect is the case of Mayor v. Ryan, 7 Daly, 436.

In the case of People ex rel. Kellogg v. Schuyler, 4 N. Y. 173, the bond of a sheriff was given "for the faithful performance of the duties of his office," and it was held that the sheriff, who, having in his hands a process against the property of the defendant therein, seizes, by virtue thereof, the goods of another person, is liable for *official* misconduct, and his sureties became liable upon his official bond.

In the case of People ex rel. Comstock v. Lucas, 93 N. Y. 585, it was said in an action against a constable and his sureties that "Where, however, the constable commits a bare trespass upon the property of a third person, not a party to the execution, although under color of his process, the liability he incurs to the person injured is in no just sense on account of the execution;" but in that case the condition of the bond was that the constable should pay to the person entitled thereto "such sums of money as said constable may become liable to pay on account of any execution which shall be delivered to him for collection," and the wrongful seizure and sale by the constable of the property of A. on an execution against B. was held not to be such a breach of the bond as to render the sureties liable. Whatever inference can be drawn from the words used in the opinion as above quoted, it is clear that they were *obiter dictum,* and later on the judge writing such opinion distinguishes that case from People ex rel. Kellogg v. Schuyler, *supra,* "by reason of the special and limited language of the bond."

The case of People ex rel. Comstock v. Lucas was followed in Berry v. Schaad, 28 Misc. Rep. 389, and it was there held that no authority is given to a constable to seize property of a stranger to the execution; that he was a trespasser, etc.; that his acts were not by virtue of his office or under authority conferred by it, and that it was not in breach of his official bond, but upon appeal (50 App. Div. 132), the court said: "The seizure and sale by the constable

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of plaintiff's property on an execution, although it was in excess of his authority, and consequently a trespass, were by virtue of his office, and were acts for which his sureties were liable," citing several cases.

In the case of De Sisto v. Stimmel, 31 Misc. Rep. 711, it was held that the act of a marshal of the city of New York in taking as indemnity for levying an execution, a deposit, instead of the undertaking required by law, was not in the line of his official duties and the sureties on his bond were not liable where he willfully refuses to return such deposit. That case was affirmed (58 App. Div. 486), and the court there said: "We have been referred to cases in other jurisdictions in which the courts have held that sureties upon official bonds are liable for acts done by their principals *colori officii,* but we are of opinion that the test of liability in this case is whether the act of the marshal in receiving the deposit was an official or purely an individual one. In the cases in which the surety has been held liable for acts of a principal done under color of office, there was present an element of trespass or wrongdoing as against third parties. There was no such element in the receipt of the money by the marshal in this case. He and the plaintiff entered into an agreement by which the former deposited with him a certain sum of money as indemnity. The marshal had no power to exact it; he had no authority to demand any other indemnity than that provided by the statute, namely, a bond. But it was not a wrongful act on his part to accept other indemnity if it were tendered or furnished him by the plaintiff. The furnishing of that indemnity, however, was a matter resting in contract between himself and the plaintiff. The liability of a surety upon a marshal's bond does not extend to making good defaults of the marshal upon special contracts which may be made by him with persons for whose benefit he is charged with the execution of legal process."

The defendants can, therefore, derive no benefit from the case last referred to.

On the other hand, in Dennison v. Plumb, 18 Barb. 89, which has never been overruled, and cited in 7 Daly, 382, and 43 N. Y. 516, with approval, many cases were collated and compared and the conclusion arrived at was that where a sheriff seizes and sells the property of B. upon an execution against A., he is to be regarded as doing an act in his official capacity.

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In the case at bar the bond is conditioned for the faithful discharge by the marshal of the duties of his office, and in default thereof the surety agreed to pay all damages, costs and expenses resulting from such default, etc.

It seems clear that Rain, in taking the property of the plaintiff herein, was acting as marshal; he had process; he was set in motion as an official; he assumed to take the property of the plaintiff by virtue of the attachment then in his hands; his act was done *colore officii*, and he was not faithfully discharging the duties of his office which forbade his taking property other than that of the defendant named in the attachment. I am in favor of affirming the judgment.

MacLean and Blanchard, JJ., concur.

Judgment affirmed, with costs.

Samuel Barnett, Appellant, *v.* Barbara Ann Walker, Respondent.

(Supreme Court, Appellate Term, November, 1902.)

Lien — Of a boarding-house keeper does not attach to property of a third person brought on the premises by a boarder.

The lien of a keeper of a boarding-house, as now existing, is established by the Lien Law (L. 1897, ch. 418, § 71, as amd. L. 1899, ch. 380), a new enactment, and said section 71 gives such keeper no lien on property brought upon her premises by a boarder nor any right to detain it for board, etc., where the legal rights to both the title and possession of the property were then in another — and this because the true owner cannot under the Constitution be divested of his property except by due process of law.

Appeal by plaintiff from judgment of the Municipal Court of the city of New York, seventh district, borough of Manhattan, in favor of the defendant, for the possession of a sewing machine, etc., and for the costs of the action.

C. B. Plante, for appellant.

J. D. Montross, for respondent.

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FREEDMAN, P. J. This action was brought to recover the possession of a sewing machine detained by defendant, a boarding-house keeper, under a claim of lien thereon for the amount of an unpaid board bill incurred by one Barnes. The said sewing machine was originally the property of one Fiske, plaintiff's assignor, who leased the same to Barnes under a written agreement, of which Barnes received a duplicate copy. Under that agreement, whether it be treated as a lease or a contract of conditional sale, the title remained in Fiske until full payment of the purchase price. By the subsequent default of and demand upon Barnes, Fiske became entitled to the immediate possession of the machine and Barnes lost all right to the possession thereof. After such default and demand and in violation of the said agreement, Barnes moved the machine to the premises of the defendant and became a boarder of the defendant and as such incurred a liability to the defendant for board to the amount of thirty-two dollars.

Assuming that the defendant had no knowledge or notice of the rights of the true owner and furnished the board in reliance upon a representation of Barnes that he was the owner, though the case contains no proof of such reliance, the only question to be determined upon this appeal is whether the defendant has a lien as claimed and may detain the machine by virtue of it as against the plaintiff, the true owner.

At common law, a boarding-house keeper had no lien. Cochrane v. Schryver, 12 Daly, 174. He was not bound to receive any one except upon special contract. 1 Am. & Eng. Ency. of Law (2d ed.), 591, and cases there cited.

The first statute in this State giving to a boarding-house keeper a lien was chapter 446 of the Laws of 1860, by which a lien and right to detain was given to the same extent and in the same manner as innkeepers have such lien and right of detention. In 1876 this statute was amended (Laws of 1876, chap. 319) by adding to the original act the following, viz.: "Nothing herein shall be deemed to give to any boarding-house keeper any lien upon or right to detain any property the title to which shall not be in said boarder."

On the other hand, the innkeeper had a lien at common law upon the goods of a guest, for the reason that he was compelled to accept all guests who presented themselves, and was liable to pay

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for all property lost or stolen while the guest remained, and nothing excused him from this liability but the act of God or the public enemy. On account of this extraordinary liability the law gave the innkeeper a lien upon the goods of his guest for the satisfaction of his reasonable charges. This lien extended to property brought by the guest and not owned by him. Jones v. Morrill, 42 Barb. 623. But he had no lien on the goods of a boarder. In this country many hotelkeepers act in a double capacity, being both innkeepers and boarding-house keepers. As innkeepers, they entertain travelers and transient persons, those who come without bargain as to time and price, and go away at pleasure, paying for only the actual entertainment received. As boarding-house keepers they entertain residents and regular boarders and lodgers for definite lengths of time and at specified prices previously agreed upon.

In the course of the codification of the general laws of this State, the Legislature in 1897 passed chapter 418 of the Laws of 1897, entitled "An Act in relation to liens, constituting chapter forty nine of the general laws." Section 1 provides that: "This chapter shall be known as the lien law." Its provisions cover: (1) Mechanics' liens; (2) Liens on vessels; (3) Liens on monuments, gravestones, and cemetery structures; (4) Liens for labor on stone; (5) Liens for service of stallions; (6) Other liens on personal property; (7) Enforcement of liens on personal property by sale; (8) Chattel mortgages, and (9) Contracts for the conditional sale of goods and chattels.

It repealed the following acts concerning liens for the benefit of hotels, inns, and boarding and lodging-houses, viz.: Laws of 1860, chapter 446, as amended by Laws of 1876, chapter 319; Laws of 1894, chapter 253; Laws of 1895, chapter 884.

In the place of the acts thus repealed, and for the purpose of consolidating them, as appears from the report of the Statutory Revision Commission, section 71 of said act was passed, which reads as follows, viz.: "§ 71. A keeper of a hotel, inn, boarding house or lodging house, except an emigrant lodging house, has a lien upon while in possession, and may detain the baggage and other property brought upon their premises by a guest, boarder or lodger, for the proper charges due from him, on account of his accommodation, board and lodging and such extras as are fur-

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nished at his request. If the keeper of such hotel, inn, boarding or lodging house knew that the property so brought upon his premises was not, when brought, legally in possession of such guest, boarder or lodger, a lien thereon does not exist."

The amendment of this section by chapter 380 of the Laws of 1899 further provided that if the keeper of such hotel, inn, boarding, or lodging-house, had notice that such property was not then the property of such guest, boarder, or lodger, a lien thereon does not exist.

We have thus, in the new section passed to supersede the prior law upon the subject, a consolidation of a statute, by which a lien unknown to the common law was given to a boarding-house keeper, but which at the same time provided that he should have no lien upon goods brought to him by a boarder who held no title to them, with a rule of the common law which gave to an innkeeper a lien upon all property brought by a guest and denied to him a lien in the case of a boarder. But the act is silent as to the persons against whom the lien may be enforced and as to the extent of the lien.

What then is the extent of the lien given by this new section to a boarding-house keeper and against whom can it be enforced? The respondent claims and the judge below held that it was the intention of the Legislature to give to boarding-house keepers the same lien upon the effects of their boarders as the common law gave to innkeepers upon all goods brought by their guests. But this is evidently too broad a construction.

In my judgment the section referred to must be treated as a new enactment, and, as such, construed in connection with the constitutional provision that the real owner shall not be deprived of his property against his consent without due process of law.

The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent, and, consequently, that even a *bona fide* purchaser from a person in the possession of property, who has no title to it and no authority whatever from the owner to sell or dispose of it, cannot acquire any title against the true proprietor. Williams v. Merle, 11 Wend. 80; Ely v. Ehle, 3 N. Y. 509; Everett v. Coffin, 6 Wend. 603; Everett v. Saltus, 15 id. 474, and same case on error, 20 id. 269.

To whatever and however numerous exceptions this rule of our

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law may be subject, it is unquestionably, in the language of Senator Verplanck, in the case last referred to, the general and regulating principle, modified only by the absolute necessity or the obvious policy of human affairs. Thus the law will, in many cases, imply an authority from the owner to sell, and where the owner has conferred an apparent right of property upon the vendor or an apparent right of disposal, and has furnished the vendor with the external *indicia* of such right, and the vendor has sold the goods and delivered the possession thereof, the law will protect a purchaser who has acquired the property for a fair and valuable consideration, in the usual course of trade, and without any notice of any conflicting claim or of suspicious circumstances calculated to awaken inquiry or to put him on his guard, although the goods were in fact obtained by the vendor from the true owner fraudulently. But as long as an owner has not by his own acts created a situation from which an authority to sell may be implied, he is in a position to invoke the protection extended to him by the constitutional provision to the effect that he shall not be deprived of his property except by due process of law. The mere parting with the possession of goods has never been held sufficient to deprive him of the constitutional protection.

The same reasoning applies whenever it is attempted to subject the property of an owner to a lien for acts done by another. In the case at bar, Barnes, at the time he brought the sewing machine into the house of the defendant, had neither title nor right of possession to it. He had forfeited the right of possession, and had nothing to show by which the defendant could have been misled. On the contrary, the written agreement under which he had originally obtained possession, showed that he had neither title nor right of disposition. The consequence is, that to construe section 71 of the Lien Law as contended for by the defendant, would be in violation of the constitutional provision above referred to.

In this State, the question as to the constitutionality of an act granting to an innkeeper or boarding-house keeper a lien as against the rights of a true owner has never been passed upon, but in other States it was held that, since the passage of a similar constitutional provision, an act granting such a lien would be unconstitutional and that consequently a course of reasoning cannot be sanctioned by which the conclusion is arrived at that the Legis-

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lature intended to preserve a rule of the common law, by enacting a statute, the terms of which are suspectible of a construction not in conflict with the constitutional provision. Wyckoff v. Southern Hotel Co., 24 Mo. App. 382; McClain v. Williams, 11 S. Dak. 227.

An analogous question arose in this State as to the lien of a warehouseman, under chapter 663 of the Laws of 1895, and the act was held to be unconstitutional. Milligan v. Brooklyn Warehouse Co., 34 Misc. Rep. 55.

Section 71 of the Lien Law of this State must therefore be construed as not preserving the rule of the common law which gave to an innkeeper a lien upon all the goods brought by his guest, whether owned or not owned by the latter, and as authorizing only the detention of goods brought in by the guest to the extent of his interest in them, if he has any. If, therefore, the lien of a boarding-house keeper upon goods brought by the boarder is now coextensive with the lien of an innkeeper upon the goods of a guest, which may be assumed for the purposes of the present discussion, although section 71 does not say so in express terms, it does not cover property of a boarder to which he had neither title nor right of possession. The fact that, in the concluding part of the section, it is provided that, if a keeper of a hotel, inn, boarding or lodging-house knew or had notice that the property brought upon his premises was not, when brought, legally in the possession of the guest, boarder, or lodger, a lien thereon does not exist, can make no difference. Because the Legislature saw fit to express one limitation, it does not follow that there should be no other, especially where the extent of the lien has not been defined by the act, and a constitutional provision calls for a further limitation.

The judgment must be reversed and a new trial ordered, with costs to appellant to abide the event.

BLANCHARD, J., concurs in result.

MACLEAN, J. (concurring). The facts agreed upon are: A sewing machine belonging to one Fiske was leased by him to Barnes under a writing binding Barnes to pay certain rental monthly, and not to remove the machine from the premises he was occupying without the consent of Fiske. Barnes did not perform his covenants. After his default, and when Fiske was

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entitled to retake the machine, Barnes removed it to the premises of the defendant, with whom he became a boarder. Thereafter Fiske transferred his rights to the New Haven Sewing Machine Co., which in turn transferred them to the plaintiff. Proper demand was made for the chattel, delivery of which was refused by the defendant, who claimed a lien thereon. Upon removing it to the house, Barnes represented to the defendant that he was the owner of the machine. He incurred liability for board to the amount of thirty-two dollars, for which the defendant claims a lien, and that her lien is superior to the rights of the plaintiff under section 71 of the Lien Law, providing "A keeper of a hotel, inn, boarding house, or lodging house * * * has a lien upon while in possession, and may detain the baggage and other property brought upon their premises by a guest, boarder, or lodger, for the proper charges due from him on account of his accommodation, board, and lodging." This deliverance of the Statutory Revision Commission may not merit the neighborly comment bestowed in 34 Misc. Rep. 56, upon chapter 663 of the Laws of 1895, relating to liens of warehousemen, but taken literally and alone these words seem to support the position of the defendant. Given the defendant's interpretation, of which it is capable, and viewed apart from the coexisting body of law, written and unwritten, recognizing rights of property and of possession in persons beside the keepers of inns or boarding-houses and their customers, this section of the Lien Law would impute to the Legislature an intention in part to nullify the fifth amendment of the Constitution, and repeal many statutes of principle and of procedure and of police regulation, all in the special interest of purveyors of food and shelter and attendance. Thus interpreted, the section would practically empower persons to pledge articles in or to which they had no legal right in such a way that those rightfully entitled to their possession would have to redeem them or abandon their property, and would, among other things, help the keepers of hotels of melancholy prænomen to add receiving stolen goods to their present occupations, already too multifarious. The mischievous and absurd consequences of the verbal interpretation contended for move the more toward considering the section, upon which depends the position of the defendant, in the light of reasonable purposes, and in connection with the remainder of this and

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other acts relating to liens upon chattels and their enforcement, and to hold, following long accepted precedent (Willis v. Warren, 1 Hilt. 590, 594), that the act only authorizes innkeepers to detain the goods actually brought in by guests, subject to the ascertainment by legal process of the legal relations of all parties concerned.

Judgment reversed, new trial ordered, with costs to appellant to abide event.

THOMAS STURGIS, as Fire Commissioner of the City of New York, Appellant, *v.* MAURICE GRAU, Respondent.

(Supreme Court, Appellate Term, November, 1902.)

New York city — Meaning of a "passageway" in a city place of amusement as used in L. 1897, ch. 378, § 762.

Where the manager of a place of amusement in the borough of Manhattan keeps unobstructed during a public performance, the passageways of the orchestra circle and the spaces on the same floor leading from these passageways directly to the doors of ingress to and egress from the auditorium, he does not subject himself to the penalty, imposed by the charter of the city of New York (L. 1897, ch. 378, §§ 762, 773) upon such a manager for failing, upon notice so to do from a member of the uniformed force of the city fire department, to cause the removal of persons standing or sitting during a public performance "in any passageway" of such a place, by permitting several hundred persons holding merely tickets of admission to stand during the performance in the space between the orchestra circle and the rear wall of the auditorium, from which the chairs had been removed — and this because such space is not to be deemed a "passageway" where the evidence shows that it was neither accustomed to be nor needed to be used as such.

MacLean, J., dissented.

APPEAL by the plaintiff from a judgment, rendered in favor of the defendant in the Municipal Court of the city of New York, eighth district, borough of Manhattan.

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George L. Rives, Corporation Counsel (Arthur F. Cosby, of counsel), for appellant.

Hoadly, Lauterbach & Johnson (Edward Lauterbach, Herbert R. Limburger and B. F. De Frece, of counsel), for respondent.

FREEDMAN, P. J. This action was brought to recover the penalty for an alleged violation of section 762 of the Greater New York charter, which provides as follows: "Whenever any member of the uniformed force of said (fire) department shall discover in any * * * passageway in any such place of amusement * * * any person or persons standing or sitting therein, during any public performance, it shall be the duty of such member of the uniformed force forthwith to notify the * * * manager of such place of amusement * * * to cause the person or persons standing or sitting in such * * * passageways to forthwith vacate the same. If the manager or proprietor, etc., * * * shall cause or permit * * * any person to stand or sit therein, during any public performance, or, having been so notified, shall neglect or refuse * * * to cause such person or persons to forthwith vacate said * * * passageways, they shall * * * be deemed to have violated the provisions and requirements of this title and the regulations or orders duly made thereunder, and shall be subject to the penalties prescribed in this act."

Section 773, on fines and penalties, prescribes that: "Any person, persons or corporations, for the violation of or noncompliance with, any of the several sections of this title, shall severally forfeit and pay a fine or penalty in the sum of fifty dollars for each and every offense."

At the Metropolitan Opera House, located on the west side of Broadway in this city, on Monday evening, April 21, 1902, there were standing between the rear of the orchestra seats and the wall that divides what is called the "foyer" from the orchestra on the ground floor of the house, a number of persons, stated to be 311. The defendant, the manager of the house, was ordered by the fireman on duty that night to remove those people standing back of the seats in the orchestra circle and he refused to do so. Thereupon this action was brought. The

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only point at issue is, whether or not the space described as aforesaid is a passageway within the meaning of the act above mentioned. After an exhaustive trial had of the issues involved, the learned trial justice in the court below wrote an opinion in which, after reviewing the evidence and the authorities applicable to the facts in the case, he says: "I, therefore, take it that a passageway, within the meaning of the statute, is that portion of the building through which persons going to or from their seats are accustomed to, or must of necessity pass; and as the evidence convinced me that persons were not accustomed to, and did not, upon the night in question, and were not required to pass through any portion of the building in which defendant permitted persons to stand, the conclusion necessarily follows that the space in question is not a passageway within the contemplation of the statute." We have given this case careful consideration and find no reason for reaching any other result.

The question in dispute is one of fact and is related to a particular evening performance. On that evening the chairs were removed and persons holding tickets of admission permitted to stand in the places formerly occupied by the chairs. No person was permitted to stand in any of the passageways which had always been used as such. The doors through which ingress and egress could be had to and from the aisles between the various portions of the orchestra circle were all directly opposite the said aisles, except one door in the very center of the building marked "X" upon the diagram submitted. As to that door the testimony was that it was not used as a means of ingress at all, but that it was kept closed before and during the performance and used merely as an additional means of exit for persons standing immediately in front of said door after the performance or any act. Sturgis v. Coleman, 38 Misc. Rep. 302, has no application to the present case.

Judgment affirmed, with costs.

BLANCHARD, J. (concurring). The only question presented on this appeal is this: Was the space in the rear of the orchestra circle of the theatre a passageway within the meaning of the statute? Under the facts, as disclosed by the evidence, I think that the trial justice was justified in his finding that on April 21,

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1902, the night of the alleged violation of the statute, the space was not a passageway.

The safety of the public, for whose benefit the statute was enacted, is not endangered by the finding of the trial justice, nor would it, in my judgment, add to the safety of the public in an emergency, if this space should be held as a passageway. There is a direct passageway from the seats to the corridor which runs around the house. The space in the rear of the seats and between the aisles is in no sense necessary for egress or ingress.

I do not think it can be said, from the evidence in this case, that the defendant has voluntarily set apart the space where the violation of the statute is claimed to have occurred for a passageway. The evidence on behalf of the defendant is to the contrary and we would not be justified in assuming the defendant's intention to set this space apart as a passageway simply because the plans on file in the building department show the space unoccupied by seats.

I concur in the opinion of the presiding justice that the trial justice was correct in his decision.

MacLean, J. (dissenting). It appears from the plan itself that the space in question was offered to the public as a passageway, and it is shown by the testimony that it was used as such by the public. While the manager of a theatre has the right, within the law, to utilize the capacity of his house, the law does not permit him to sell and utilize so much thereof as he has of his own volition offered as a passageway to the public. Sturgis v. Coleman, 38 Misc. Rep. 302.

The judgment should, therefore, be reversed.

Judgment affirmed, with costs.

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CARL G. A. HOHLE, Respondent, *v.* CARL E. RANDRUP, Appellant.

(Supreme Court, Appellate Term, November, 1902.)

Judgment — Measure of assignee's damages where the assignor wrongfully satisfies it and for less than its face — Insolvency of judgment debtor.

Where an assignee of a judgment sues his assignor for breach of his assignment covenant not to collect or receive the judgment or any part thereof nor release or discharge it, and the proof is that the assignee paid the assignor for the judgment its face value and that the assignor, the assignment not having been recorded, thereafter satisfied it for one-fifth of its face, the assignee may recover the face value of the judgment where the assignor although pleading insolvency of the judgment debtor does not show that it continued down to the time of the commencement of the action for the breach.

APPEAL by the defendant from a judgment, rendered in favor of the plaintiff in the Municipal Court of the city of New York, eleventh district, borough of Manhattan.

Norwood & Dilley, for appellant.

Robert Godson, for respondent.

FREEDMAN, P. J. This action was tried in the Municipal Court on the 21st day of July, 1902, and the cause of action arose out of the following facts, which are not disputed:

The defendant, on April 6, 1898, obtained a judgment in the City Court against one Olsen for the sum of $374.16. On May 5, 1898, by an instrument in writing, the defendant for the sum of $374.16 duly assigned said judgment to the plaintiff herein.

Said assignment contained the following clause: "And the said party of the first part does covenant that there is now due on the said judgment the sum of $374.16, and that he will not collect or receive the same or any part thereof, nor release or discharge the said judgment but will own and allow all lawful proceedings therein, the said party of the second part saving the said party of the first part harmless of and from any costs in the premises."

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On or about August 1, 1901, the defendant, without the knowledge or consent of the plaintiff, and at the solicitation of an attorney representing the judgment debtor and upon payment to the defendant of the sum of seventy-five dollars, satisfied said judgment, and on August 2, 1901, the satisfaction piece was filed in the office of the clerk of the City Court and said judgment was thereupon discharged of record. Practically, the only question to be determined herein is what, under such circumstances, was the correct measure of damages. The court below directed a judgment in favor of the plaintiff for the face value of the judgment with interest. The appellant claims that the measure of damages is the value of the judgment measured by the possibility of collecting it from the judgment debtor. The answer alleged that the judgment debtor was insolvent, both at the time of the rendition of the judgment and also when the same was satisfied, and he offered proof tending to show that at the time the judgment was satisfied the judgment debtor was insolvent and unable to pay his debts, and paid into court the sum of eighty-four dollars and ninety cents, being the amount paid to the defendant for the satisfaction of the judgment with the interest thereon.

It has been held: "That a party who, after having for a valuable consideration assigned a judgment, satisfies it, clearly incurs a liability to his assignee. If the satisfaction piece is given on payment of the judgment, the money may be recovered by the assignee in an action for money had and received, and if the satisfaction is given without payment, and the assignee is prejudiced thereby, he is entitled to recover of his assignor the damages sustained. In the absence of proof to the contrary, the presumption arising from the giving of the satisfaction piece is that it was given upon payment of the judgment." Booth v. Farmers' & Mechanics' Bank, 50 N. Y. 396. It was not disputed, upon the trial, that the defendant received not more than seventy-five dollars in satisfaction of the judgment. Clearly, the defendant had no right, under the covenant in his assignment, to "collect or receive the same or any part thereof, nor release or discharge the said judgment." He was sued for a breach of this covenant, and admitted liability thereunder to the amount received by him from the judgment debtor, but sought to escape payment of a larger sum by showing the insolvency of the

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judgment debtor at the time the judgment was recovered and also at the time of the satisfaction of the judgment by the defendant. Testimony to this effect was introduced by the defendant. As judgment was directed in favor of the plaintiff for the full amount claimed by the plaintiff, we are to infer that such testimony was not deemed sufficient by the trial judge. Without passing on the question as to whether or not the insolvency of the judgment debtor was clearly shown to exist at the time of the satisfaction of the judgment on August 1, 1901, I am of the opinion that such insolvency should have been shown to have continued down to the commencement of this action.

The plaintiff herein owed no duty to his assignor to record or file his assignment and as to him was guilty of no remissness in failing to do so. He had a right to hold the judgment for years if he so desired in the expectation that the judgment debtor named therein would become possessed of sufficient property out of which the judgment could be made, relying on the defendant's covenants contained in the assignment not to release the same. It may be that the judgment debtor had become solvent between the date of the satisfaction of the judgment and the time of the action. Insolvency is never to be presumed, neither is an admission of insolvency at a given time any evidence of insolvency at any considerable time thereafter. Walrod v. Ball, 9 Barb. 271; 6 B. Mon. 116. However innocently and in good faith the defendant herein satisfied said judgment, it is undisputed that he had received from the plaintiff its full face value, viz., $374.16, for the same, and in this action seeks to return to the plaintiff therefor but $75. He should be held to a strict accountability for his acts and be relieved therefrom only by a clear case. Extensive research has enabled me to find but one case somewhat similar to this, and in that case the court held that the measure of damages was the value of the property owned by the judgment debtor and which might have been taken in execution intermediate the time of the assignment and the commencement of the suit. Jansen v. Ball, 6 Cow. 628. For these reasons I am in favor of affirming the judgment.

MacLean and Blanchard, JJ., concur.

Judgment affirmed, with costs.

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JACOB ROTHOSER, Respondent, *v.* JULIUS COSEL and MORRIS GOLDSTEIN, Appellants.

(Supreme Court, Appellate Term, November, 1902.)

Bailment — For hired work upon a thing — Bailee's duty to return it.

The relation which exists between a tailor who makes up clothing and clothing manufacturers who furnish him the cut goods to make up is that of bailee and bailor, requiring the former to return the goods, and therefore where, after they have been stolen from the bailee, he sues for the value of his work upon the goods his mere testimony that he had nothing to do with the theft of them affords no defense to the manufacturers' counterclaim for their value.

APPEAL by the defendants from a judgment, rendered in favor of the plaintiff in the Municipal Court of the city of New York, fourth district, borough of Manhattan.

Sol. A. Cohn, for appellants.

Abraham H. Sarasohn, for respondent.

FREEDMAN, P. J. The plaintiff brought this action and claimed to recover the sum of $132.88 for work, labor and services performed for the defendants in making up clothing, the plaintiff being a tailor and the defendants being manufacturing clothiers. The custom was for the defendants to deliver to the plaintiff cut and unmanufactured clothing which the plaintiff would make up at an agreed price, and was paid therefor upon delivery by him to the defendants when so made up. In February, 1902, there was one consignment to the plaintiff of ninety-nine pairs of pants of the value of $198.66 which was stolen from the premises of the plaintiff.

At the time of the theft there was a sum due from the defendants to the plaintiff for work performed on other goods, and the plaintiff continued to make up clothing for the defendants. It is claimed by the defendants that at this time an agreement was made between the parties, by which agreement the plaintiff was to pay said sum of $198.66 by allowing the sum of $25 to be de-

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ducted from the amount then due him and then subsequent weekly deductions were to be made at the rate of ten per cent. each week from the amounts due the plaintiff for future work, the defendants on their part agreeing that they would not begin an action against the plaintiff to recover the value of the stolen property. Subsequently, eight weekly payments were made to the defendants by eight deductions being taken from the amounts due the plaintiff, which deductions, on April 1, 1902, amounted to the sum of $48. At that time there was also due the plaintiff for work the sum of $49.10, leaving a balance due the defendants, as claimed by them, of the sum of $101.56.

The agreement to pay the defendants for the stolen property is denied by the plaintiff. The plaintiff, claiming that the defendants owed him as follows: *First,* the sum of $49.10 for work; *second,* the sum of $35.64 for the making up of the stolen pants, and *third,* the $48 deducted by the defendants as aforesaid, the sum total amounting to the sum of $132.74, brought this action to recover that amount.

The defendants interposed a counterclaim for the sum of $101.73, being the amount claimed by them to be due after deducting from the value of the stolen pants the sum of $49.10 due him for work and the sum of $48 deducted as by their alleged agreement as above stated.

The trial judge gave a judgment in favor of the plaintiff for the sum of $84.50.

By what process of reasoning he arrived at that amount it is impossible to determine. It is clear that the plaintiff, if entitled to a judgment at all, was entitled to the full amount of his claim. He seemingly is satisfied, however, with the judgment as rendered, the defendants alone appealing.

The delivery of the ninety-nine pairs of pants to the plaintiff, their value and the fact that the plaintiff claimed that they had been stolen was undisputed.

The relation between the plaintiff and defendants was that of bailee and bailors.

The defendants had delivered the goods to the plaintiff which he was bound to return. There can be no doubt that, upon these facts alone and for failure on the part of the plaintiff to return goods of a certain value, the defendants could offset or counter-

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claim therefor, in an action brought by the plaintiff against them for labor and services. This they did in this action. The burden was upon the plaintiff to account for the goods committed to his care. This he failed to do. He claims that they were stolen, but the only testimony given by him in regard to the theft was that they were stolen and that he had nothing to do with the theft. "It is not, of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty." Claflin v. Meyer, 75 N. Y. 260–263.

Such testimony was insufficient. It follows, therefore, that, as the testimony stood at the close of the case, the right of the defendants to recover upon their counterclaim had not been destroyed.

As the foregoing necessitates a reversal of the judgment herein, it is not necessary to pass upon the validity of the agreement, alleged to have been made between the parties, subsequent to the alleged theft of the defendants' property.

MacLean and Blanchard, JJ., concur.

Judgment reversed, new trial ordered, with costs to appellants to abide event.

Frank Howard Cothren et al., Respondents, *v.* George M. Chaffee, Appellant.

(Supreme Court, Appellate Term, November, 1902.)

Municipal Court of the city of New York — Amendments to a return how obtained before September 1, 1902 — Settlement of a case on appeal unauthorized before that date — Limit of time for moving for a new trial.

Prior to September 1, 1902, when chapter 580 of the Laws of that year went into effect, there was no authority in a justice of the Municipal Court of the city of New York to settle a case appealed therefrom, and amendments desired to his return could be obtained only by a motion for an amended return made under Code C. P., § 3055.

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Therefore where a defendant, who appealed in February, 1902, from a judgment of said court rendered against him in January, 1902, and procured a case on appeal to be settled by the trial justice, was dissatisfied with it as settled and moved for a resettlement or a new trial, the Appellate Term considered that, as there was no authority for the settlement, no appeal could lie to it from an order of the Municipal Court denying a resettlement, and that the motion for a new trial must be denied because it had not been made within five days after entry of the judgment as required by L. 1896, ch. 748.

APPEAL from an order made in the Municipal Court of the city of New York, tenth district, borough of Manhattan, denying defendant's motion for an order granting a new trial herein or in the alternative for an order resettling the case herein on appeal.

Chapter 580 of the Laws of 1902, went into effect on September 1, 1902.

Clarke & Clarke, for appellant.

Edgar Gilman Pratt, for respondents.

FREEDMAN, P. J. This action was tried on January 24, 1902. On January 28, 1902, judgment was rendered in favor of the plaintiffs against the defendant. On February 5, 1902, the defendant appealed from the judgment. Subsequently, and before the return herein was made, the stenographer who took the evidence upon the trial died, without transcribing his minutes of such evidence. Thereafter the appellant herein made and served a proposed case on appeal, containing the testimony and objections and exceptions taken during the trial. Amendments thereto were proposed by the respondents, and the proposed case and amendments were submitted to and settled by the trial judge.

At the time the appellant offered the proposed case for settlement he had the notes of the deceased stenographer taken at the trial in his possession — whether he had then caused them to be transcribed does not appear. Subsequently, however, and after the case had been settled, he procured one Bridges to transcribe the notes, and his (Bridges') interpretation of them differing apparently from the settled case, the appellant made Bridges' version of the testimony a basis of his motion aforesaid, for a re-

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settlement of the case or a new trial. This case comes under the provisions of the statutes in force prior to the passage of chapter 580 of the Laws of 1902, and until that act went into effect there was no provision for the settlement of a case by a justice of the Municipal Court upon appeal. Amendments sought to be made to a justice's return (which return was required to contain the evidence taken on the trial, section 3053, Code of Civil Procedure), could only be obtained by a motion for an amended return under section 3055, Code of Civil Procedure. If, for any reason, the justice could not make a return, the case on appeal was to be determined by the provisions of section 3056, Code of Civil Procedure. It will be seen, therefore, that the appellant herein sought his own mode of procedure in the lower court, in order to have the return upon appeal contain the testimony taken at the trial, and, as appears by the return of the justice, for he states that "The following is the testimony taken upon the trial of this case as agreed upon by the attorneys for the respective parties," which statement is corroborated by admissions contained in the appellant's brief on this appeal, after preparing a case, and amendments thereto were submitted, agreed that the trial judge should settle the same, which was done pursuant to such agreement. So far as the appellant's motion for a resettlement of the case on appeal is concerned he has no warrant, either in equity, law or practice.

His motion for a new trial is equally untenable. A motion to vacate, set aside, or modify a judgment must be made within five days after its rendition. Consol. Act, § 1367, as amended by Laws of 1896, chap. 748.

The order appealed from is affirmed, with costs.

MacLean and Blanchard, JJ., concur.

Order affirmed, with costs.

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LOUIS OSHINSKY, Landlord-Respondent, *v.* JOHN GREENBERG, Tenant, and CHARLES KATZ et al., CHARLES KATZ, Appellant.

(Supreme Court, Appellate Term, November, 1902.)

Lease — When a surrender does not prejudice a subtenant.

Where a tenant, having a right so to do, sublets the basement of the demised premises and thereafter, before expiration of the term of either lease, surrenders his own to one claiming, but not shown, to be the grantee of the original lessor, the surrender does not affect the vested right of the subtenant to continue to occupy the basement during his entire term.

APPEAL by Charles Katz, an under or subtenant, from a final order in summary proceedings, awarding the possession of certain demised premises to the landlord herein, granted in the Municipal Court of the city of New York, fourth district, borough of Manhattan.

Kantrowitz & Esberg (Moses Esberg, of counsel), for appellant.

Samuel Hoffman, for respondent.

FREEDMAN, P. J. Summary proceedings were instituted in the Municipal Court by the respondent to recover possession of certain premises, described in the petition, against one John Greenberg, as tenant, and Charles Katz, as undertenant, and a final order awarding the landlord possession of said premises was granted.

The undertenant alone appeals. The petition sets forth:

(*a*) That in March, 1902, Simon Shapiro, the former owner and landlord, entered into a written agreement or lease with John Greenberg for the entire building, No. 112 Eldridge street, for the term of three years, commencing May 1, 1902.

(*b*) That such lease contained a provision as follows: "Should the landlord, Simon Shapiro, sell the premises, or desire to build a new building thereon, then, upon giving two months' previous notice, in writing, to the tenant, John Greenberg, and upon payment then and there of the sum of $500, if this shall occur during

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the first year, or the sum of $400 if the same shall occur during the second year, or the sum of $300 if the same shall occur during the third year, then, and at the expiration of two months from the service of the notice and the payment of the money, the lease shall terminate and be at an end."

(*c*) That on May 8, 1902, the former owner, Shapiro, conveyed the premises to the present owner, Louis Oshinsky.

(*d*) That on June 30, 1902, the tenant Greenberg surrendered the lease to Oshinsky.

(*e*) That the tenants and undertenants hold over.

The undertenant interposed an answer containing a denial of all the allegations set forth in the petition except that he admitted that he was in possession of the basement of said premises and alleged that Greenberg had leased to him (Katz) said portion of the premises for a term of one year beginning May 1, 1902, under a written lease and that the alleged surrender of Greenberg was without the knowledge or consent of Katz and in fraud of his rights. The lease between Shapiro and Greenberg was offered and received in evidence. The words "not let or underlet the demised premises or any part thereof," were erased and it provided that the premises should be used for dwelling purposes only, except that the basement and parlor floor might be let for business purposes.

No evidence of the giving of the two months' notice or the payment of the sum of $500, as provided for in the lease, was offered at the trial nor was the sale or transfer of the property to the respondent herein shown. It was shown that Greenberg had surrendered the lease to the respondent herein and consented to an issuance of a warrant of dispossession in these proceedings.

The lease from Greenberg to the appellant herein was put in evidence and showed that Greenberg had let the basement to Katz for one year from May 1, 1902, which lease was dated March 11, 1902. The undertenant moved at the close of the landlord's case and again at the close of the whole case for a dismissal of the proceedings as to him, upon the ground that the landlord had not made out a case entitling him to a final order of dispossession and upon the specific ground that Greenberg, the tenant of the entire building and the landlord of Katz, could not, by a surrender of his lease, deprive Katz of his rights. This motion was denied. This was error. The landlord herein (Oshinsky) did not show

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himself to be the owner of the premises. His allegation of that fact in his petition was denied by the subtenant (Katz) and no proof to sustain that allegation of the petition was offered. Moreover, the tenant Greenberg, by the surrender of his lease, could not terminate or deprive the subtenant of his existing rights.

It has long been established that "Though a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third persons who at the time of the surrender had rights which such extinguishment would destroy. As to them the surrender operates only as a grant subject to their right, and the interest surrendered still has, for the preservation of their right, continuance. A surrender does not affect the interest of a subtenant, but he becomes the immediate tenant of the original lessor." 2 McAdam Landl. & Ten. (ed. 1900), § 399, pp. 1278, 1279; Weiss v. Mendelson, 24 Misc. Rep. 692; Eten v. Luyster, 60 N. Y. 259; Ritzler v. Raether, 10 Daly, 286.

The final order as to the appellant must be reversed, with costs, and as a new trial could not affect the issues, judgment should be rendered in favor of appellant, dismissing the landlord's petition as to him.

MacLean and Blanchard, JJ., concur.

Final order as to appellant reversed, with costs.

Fannie Horowitz, Appellant, *v.* Louis Fuchs et al., Respondents.

(Supreme Court, Appellate Term, November, 1902.)

Municipal Court of the city of New York — Order opening a default.

An order opening a plaintiff's default in the Municipal Court of the city of New York may lawfully provide that the case be set down for trial upon a day certain.

Appeal by the plaintiff from an order of the Municipal Court of the city of New York, fourth district, borough of Manhattan, made September 18, 1902, vacating and setting aside a judgment

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in favor of the defendants, entered upon the default of the plaintiff in that district.

Abraham B. Schleimer, for appellant.

Case & Newkirk, for respondents.

MacLean, J. In replevin begun by the issue of a summons, July 19, 1902, a horse and wagon were taken into possession by the marshal. On the return day, July twenty-ninth, the plaintiff appeared and one Klein, who had been served as "John Doe," answered, "demand the return of the chattels and $100 damages." Then the cause was adjourned to August thirteenth to be tried. On the call of the calendar that day the plaintiff asked for an adjournment, which was refused upon the objection of Klein. When the cause was subsequently called for trial in the due course of business of the court, the plaintiff failed to appear and judgment was accorded the defendants on default, for the return of the chattels or their value, assessed at the amount given in the plaintiff's complaint. Code Civ. Pro., §§ 1691, 1726, 1730. Sundry proceedings were had before September eleventh when the plaintiff's counsel, upon his own affidavit, verified that day, procured an order to show cause why the judgment should not be vacated and set aside, with other relief. The motion was argued on its return day, the fifteenth, and on the eighteenth it was ordered that the judgment be vacated, "but without costs, and that the action be and the same hereby is set down for trial on September 24th, 1902." From so much of the order as is contained in the words quoted in the last sentence comes this appeal. Whereupon are presented and pressed several points. Most of them are met by the history given above and by the notice of appeal showing that the only part of the order here to be considered is the portion setting down the cause for trial upon a day certain, and which portion the appellant would have reversed. Her counsel insists that the justice had no jurisdiction again to set the cause down for trial, that the judgment was a nullity, and that the vacation of it restored the parties to their position upon her failure to appear, at the calling of the cause for actual trial, which failure, she claims, "virtually amounted to a discontinuance of the action," for "when the court rendered the said judgment the case was put

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out of court." It might be argued *ab inconveniendi*, that this adjustment would leave the plaintiff in possession of the horse and wagon, and their late possessor with nothing but his lawyer to pay, and the option of instituting new litigation for himself. The propositions of the appellant's counsel are not supported by the cases he cited nor by the law upon which he calls. The whole matter being one of procedure, the law governing it is the statute obtaining at the time the justice acted, to wit, section 253, chapter 580, Laws of 1902, which went into effect September first, and not section 1367 of the Consolidation Act, as stated, though there is practically little difference between them in so far as concerns the question in hand. That section of the statute empowering the justice to open the default, the power invoked by the plaintiff, now appellant, empowered him also to set the cause down for trial. That power was not exhausted by halves. Nor did the words of the order vacating the unwelcome judgment create a situation virtually or otherwise discontinuing the present action begun by the plaintiff. Actions are rarely discontinued by situation or of themselves. On most cases one may start and stop an action, as one may, to use the simile of Lord Maule, light a candle and blow it out again, but having lit his candle he must be at pains to put it out betimes lest it burn up his remedy.

Order appealed from affirmed, with costs to the respondents.

BLANCHARD, J., concurs in result.

FREEDMAN, P. J. (concurring). I concur with Mr. Justice MacLean in his disposition of this case. The plaintiff having applied for an order setting aside the judgment rendered on his default, and the order having been granted and the case set down for trial at a future day, he now appeals only from that part of the order which sets the case down for trial. It may be doubted whether he can accept the benefit of the order and repudiate the condition, but section 1367 of the Consolidation Act, as well as section 253 of chapter 580, Laws of 1902, whichever may be applicable to this case, expressly provides that a justice may open any default, etc., and set the cause down for pleading, hearing or trial as the case may require. The trial judge was clearly correct in making the order he did.

Order affirmed, with costs to respondents.

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PINCUS RONGINSKY, Landlord-Respondent, *v.* FRANK GRANTZ and ANNIE GRANTZ, Tenants-Appellants.

(Supreme Court, Appellate Term, November, 1902.)

Summary proceedings — Maintainable under a provision, in a lease, amounting to a limitation of the term but not being a condition of the lease.

A provision in a lease, for two years from May 1, 1902, that if the lessor sells before the expiration of the first year of the term the tenants shall surrender the demised premises on receiving three months' notice and the equivalent of three months' rent, is not a condition of the lease but is a limitation of the term, *ipso facto* ending it when and as soon as the lessor sells, notifies and pays.

Therefore where the lessor gives on May 1, 1902, the tenants notice of a sale made and his *mesne* grantee tenders them on August 1, 1902 the said payment in money, the term ends forthwith, the tenants thereafter hold over after its expiration without the permission of the landlord, within the meaning of the statute relative to summary proceedings, and the *mesne* grantee may dispossess them.

APPEAL by the tenants from a final order in favor of the landlord, in summary proceedings, in the Municipal Court of the city of New York, fifth district, borough of Manhattan, to recover possession of real property.

Joseph Wilkenfeld, for appellants.

Manheim & Manheim, for respondent.

MACLEAN, J. About the 7th day of March, 1902, one Barkley let certain premises to the appellants for the term of two years from May 1, 1902, the lease providing that, if the lessor sold the premises before the expiration of the first year of the lease, the tenant should vacate and surrender the premises "on receiving a three months' notice and the equivalent of three months' rent." Barkley conveyed the premises to one Meyer, and served, on May

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first, a notice upon the tenants that he had sold the property, and that possession would be required on the first of August, on which day the equivalent of three months' rent would be paid the tenants. Meyer sold to Ronginsky, who collected the rents for May, June and July. On July thirty-first, as he testified, the landlord asked the tenants to surrender, and offered them $250, the equivalent of three months' rent; both refused to take the money and to give up the premises. On August first, according to the landlord, the same thing occurred again. The tenants wanted $1,000. "By consent the jury were discharged by the court, there being no question of fact for them to pass upon." As noted above, the final order was in favor of the landlord. It is contended here that, under the statute, summary proceedings were not maintainable to remove the tenants, because the lease had not expired by its own limitations, or by words of the demise, but was attempted to be ended by the volition of the landlord. This is not tenable. In the case of Miller v. Levi, the lease to Levi was "with the privilege reserved to terminate the lease at the end of every year, by giving sixty days' previous notice, in case the landlord should desire to sell or rebuild." Objection was made before the county judge of Erie, and insisted upon before the Commission of Appeals, that the judge had no jurisdiction because this special proceeding can be resorted to only where the term of the lessee has expired by lapse of time. The court of last resort held (44 N. Y. 489, 495) that the provision was not a condition but a limitation, and that the term expired by force of the sale, and notice in sixty days thereafter without any further act of the lessor. This ruling is applicable to the case at bar. If it be urged that in the case at bar actual payment of the equivalent of three months' rent is one of the acts contemplated in the lease to create its expiration, it is enough to reply that, when the tenants refused its proffer, they eliminated the payment from the incidents essential to the termination of the lease. Having been proffered on due occasion, it had not to be tendered again or paid into court. Whether the sum can be recovered as a debt is not here under consideration. This last observation also meets the points severally raised for the tenants, that the Municipal Court has no power to enforce a covenant for the surrender of a lease; nor to compel both parties to keep their covenants; and that there is no way by which the court can see to

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it that the tenants receive the $250. The conduct of the tenants has made a consideration of these unnecessary.

The final order appealed from is affirmed, with costs to the respondent.

FREEDMAN, P. J., and BLANCHARD, J., concur.

Final order affirmed, with costs to respondent.

BIANCA LESSER, Respondent, *v.* DAVID STEIN, Appellant.

(Supreme Court, Appellate Term, November, 1902.)

Action for rent — Provisions of a lease which survive dispossession — Liquidated damages.

Under a lease providing that a deposit, made by the lessee for security and applicable primarily to the rent of the last two months of the term, may upon his failure to perform be retained by the lessor as liquidated damages for the breach and for her necessity to re-enter by due process of law, she is entitled, after dispossessing the lessee and notwithstanding Code C. P., § 2253, to retain the deposit and as liquidated damages.

APPEAL by the defendant from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, eleventh district, borough of Manhattan.

Isidor Cohn, for appellant.

M. A. Lesser, for respondent.

BLANCHARD, J. The defendant was a tenant of plaintiff, holding under a written lease, and was dispossessed on or about May 19, 1902.

Plaintiff sued to recover upon two causes of action, *first,* the rent of the premises for the month of May, 1902, the sum of eighty dollars and interest, and, *second,* a claim for seventeen dollars and fifty cents, an alleged balance due for decorative work

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done at defendant's store by a firm of decorators, and by them assigned to the plaintiff. The defendant admits the first, and as to the second cause of action sets up an alleged counterclaim of one hundred and sixty dollars, paid to the plaintiff as a deposit upon the lease at the time of its execution.

The trial of the case in the Municipal Court resulted in a judgment for the plaintiff upon both causes of action, from which an appeal is made to this court. There cannot be any doubt as to the course this court should pursue as affecting the second cause of action. A fair conflict was presented by the testimony in regard to that claim, and the trial justice resolved the conflict in plaintiff's favor, with which decision we will not interfere.

In regard to the first cause of action, the plaintiff is, of course, entitled to recover, as it stands admitted on the pleadings, unless the defendant's counterclaim for the recovery of the deposit can prevail. The lease provides: "By way of better securing the performance of the covenants and conditions of this lease by the party of the second part, he shall (at the time of execution hereof) deposit with the party of the first part, the sum of one hundred and sixty dollars ($160), which deposit the party of the first part shall apply to the payment of the last two months' rent limited under this lease, if it was not sooner terminated by the lessee's failure to perform, in which event the sum deposited shall be retained by the lessor as liquidated damages for said lessee's breach, and her necessity to re-enter or to resume possession of said demised premises, whether by due process of law or upon voluntary surrender thereof."

By the terms of said lease the defendant was obligated to suffer the landlord, if obliged to re-enter or resume possession, to "re-let the premises as agent of said lessee and receive and retain the rent therefor," and "to pay said lessor any deficiency that may arise by reason of such reletting," and also "to keep the demised premises in a proper state of repair, internally and externally." The defendant contends that his counterclaim must prevail in the first place, because by section 2253 of the Code of Civil Procedure the issuance of a warrant in summary proceedings operated as a cancellation of all further rights and obligations under the lease. But can it be said that it is now the settled law of this State that, where the lease itself by its provisions shows an intention to

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have its terms and conditions survive, the provisions of the statute referred to must give way? Longobardi v. Yuliano, 33 Misc. Rep. 472, 474; Michaels v. Fishel, 169 N. Y. 381, 390.

It will be observed that the lease provides that the landlord is to retain the deposit of $160 as liquidated damages if the landlord is obliged either to (1) re-enter or (2) to resume possession of the premises, whether (*a*) by due process of law or (*b*) upon voluntary surrender thereof.

The court must presume, therefore, that the parties intended by this language to give the right to the landlord to retain the deposit whether or not the landlord was obliged, as in the present case, to resume possession of the premises by due process of law. The other point made by appellant is that the deposit cannot be considered as liquidated damages, but is a penalty and hence void, and consequently that the defendant's counterclaim must prevail. This point was made and disposed of in the case of Longobardi v. Yuliano, *supra*. See also Caesar v. Rubinson, 71 App. Div. 180, 182.

We conclude, therefore, that the judgment should be affirmed, with costs.

FREEDMAN, P. J., and MACLEAN, J., concur.

Judgment affirmed, with costs.

THE CITY OF NEW YORK, Appellant, *v.* ROBERT HENDERSON et al., Respondents.

(Supreme Court, Appellate Term, November, 1902.)

Cities of the first and second class — Sale therein of short-weight coal.

Where coal dealers of a city of the first or second class are sued for the penalty, imposed by L. 1900, ch. 327, § 150, for selling less than 2,000 pounds by weight to a ton of coal, and the plaintiff proves that the coal in question weighed only 1,870 pounds at a public scale, they can only meet such proof by showing that the coal when it left their yard weighed 2,000 pounds, and where they fail to do so it is erroneous to dismiss the complaint.

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APPEAL from a judgment in favor of the defendants, rendered in the Municipal Court of the city of New York, third district, borough of Manhattan.

George L. Rives, Corporation Counsel, for appellant.

G. A. C. Barnett, for respondents.

BLANCHARD, J. This is an appeal from a judgment of the Municipal Court in favor of the defendants dismissing the complaint.

The action was brought to recover a penalty of fifty dollars from the defendants for a violation of section 150, in article 10, chapter 327 of the Laws of 1900, which provides as follows: "A person, firm or corporation, in a city of the first or second class attempting to sell or deliver less than two thousand pounds by weight to a ton of coal, shall be liable to a penalty of not exceeding fifty dollars, provided that in all cases thirty pounds to a ton shall be allowed for the variation in scales and wastage."

In November, 1901, the defendants sold what purported to be a ton of coal to a resident of this city, who, on paying for the coal, requested that it be weighed on a public scale. Pursuant to that request, the coal was weighed, and was found to be wanting 130 pounds, the net weight of the coal being 1,870 pounds, instead of 2,000 pounds as required by the statute cited. The coal was weighed by a weighmaster at 295 Ninth avenue, in this city, on scales owned by Thomas Thedford, which had been designated by the mayor as public scales suitable for the purpose of weighing coal, as provided by section 153 of the said law. The plaintiff's proof was directly and positively to the effect that when the coal was weighed on the duly designated public scales, under circumstances which showed that the weighing was carefully and accurately done, the weight of the coal showed a shortage of 130 pounds to the ton. There is no evidence in the record that the plaintiff's two witnesses were not entirely truthful and unbiased. The mere fact that the scales were at the yard of Thedford & Son, a competitor of defendants in business, should not override the presumption that plaintiff's witnesses told the truth; they had no personal interest whatever in the result of the weighing of the coal. The scales at Thedford's yard were selected by defendants'

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driver, and it may be assumed that he would not have selected them if he had entertained any doubt of their accuracy. He attended at the weighing of the coal and it does not appear that he did not accept as accurate the weight as shown by plaintiff's scales.

There was but one way to satisfactorily meet the plaintiff's proof; the defendants should have shown that when the coal left their yard it weighed 2,000 pounds, as it is not claimed that any of the coal was lost from the cart in transit. This the defendants failed to do. The defendant Henderson testified that at the time the coal was weighed by him at his yard his scales were tested "as near as I can remember," that "I do not remember balancing them that day," and that they balanced "as far as I know," and that the coal weighed on his scales 2,000 pounds "as near as I can remember." This testimony is no proof whatever that the coal weighed 2,000 pounds when it was weighed at the defendants' yard.

The judgment of the Municipal Court dismissing the complaint was against the weight of evidence, and is, therefore, reversed, and a new trial granted, with costs to appellant to abide the event.

FREEDMAN, P. J., and MACLEAN, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

JOHN KOHLER, Plaintiff, *v.* ERNST KLEIN, as President of Goethe Mannie No. 38, Deutcher Orden Harugari, Defendant.

(Supreme Court, Kings Special Term for Trials, December, 1902.)

Jurisdiction — Of an illegally expelled member's action for reinstatement in his benefit order — Meaning of a "decision of the order".

The Supreme Court has jurisdiction of an action to reinstate in a subordinate lodge of a benefit order a member expelled therefrom without notice or hearing, although the constitution of the order provides that any member "who deems himself aggrieved by a decision of the order is within three months entitled to appeal to the grand committee", and this because such an illegal expulsion is not to be deemed or dignified as a "decision".

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ACTION for reinstatement to a subordinate lodge of a beneficial association which paid death benefits out of a fund made up of dues and assessments paid by the members.

August P. Wagener for plaintiff.

Peter P. Huberty for defendant.

GAYNOR, J.: The plaintiff was expelled without notice or hearing from a subordinate lodge of the order. The defendant objects to this court taking jurisdiction of the case, on the ground that the plaintiff by his contract with the defendant is given the right to appeal to a higher authority in the order, and has not done so. The constitution of the order provides that any member "who deems himself aggrieved by a decision of the order is within three months entitled to appeal to the grand committee." I do not think the expulsion of the plaintiff without notice and hearing was a "decision" within the meaning of this provision (People ex rel. Deverell v. Musical Union, 118 N. Y. 101). It contemplates a decision of some question lawfully up for decision.

Judgment for the plaintiff, with costs.

Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate No. 4077, Issued to THOMAS F. GALLAGHER.

Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate No. 3536, Issued to AXEL J. YOUNG.

(Supreme Court, Kings Special Term, December, 1902.)

Liquor Tax Law — Revocation of certificate — Jurisdiction when obtained — Proof and trial — Limiting issues.

The court gets jurisdiction of the parties to and the subject matter of a proceeding, taken under the Liquor Tax Law (L. 1896, ch. 112, § 28, subd. 2), to revoke a certificate, upon service of the petition and

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order to show cause, and this although the petition be on information and belief.

In any and every case, however, a violation of the statute must be established by legal proof before the certificate can be cancelled.

The court will not limit the trial of the charges, contained in a petition such as the above, to those supported by a probative affidavit, merely because the holder of the certificate denies some of the charges and fails to deny others, and for the reason that he may succeed on charges which he denied and yet forfeit his certificate if sufficient proof is made of charges which stand undenied.

MOTION by respondent to limit the issues to be tried in a reference under section 28, subdivision 2, Liquor Tax Law (L. 1896, ch. 112), to those violations alleged in the petition which are supported by a probative affidavit.

E. B. Barnum, for motion.

William Vanamee and Herbert H. Kellogg, in opposition.

MAREAN, J. The court gets jurisdiction of parties and subject-matter upon service of the petition and order to show cause, although the petition may be made on information and belief. If it is so made and is unsupported by any affidavit affording legal proof of the violations charged, the court cannot proceed to revoke the certificate without first taking proof, either orally or by affidavit, or upon a reference.

The petition is like a complaint in an action for specific relief; judgment is not to be entered upon it by default without proof of the facts; or rather it is analogous to an information before a magistrate in a criminal case, which is no warrant for depriving the accused of his liberty or property, until supported by proof. Though all the allegations of the petition are upon information and belief, and the defendant makes no answer whatever, I think it is the duty of the court to order a reference to take proof of the violation alleged, upon the coming in of which the certificate may be revoked. And if the defendant answers denying one violation, but not denying another, it should be referred to take proof upon the issue made, and of the allegations unanswered,

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and though the issue may be determined in favor of the defendant, the certificate may be revoked and cancelled for the violations which stand undenied, if the proof warrants it. A reference will be made to cover all violations charged in the petition.

Ordered accordingly.

Matter of Application of AUGUSTA B. HAYT.

(Supreme Court, New York Special Term, December, 1902.)

National bank — Owner of a lost certificate of stock therein may apply, under L. 1892, ch. 688, §§ 50, 51, for the issue by the bank of a new one.

The provisions of the Stock Corporation Law (L. 1892, ch. 688, §§ 50, 51), relative to the right of an owner of a lost certificate of stock to apply to the Supreme Court of the State of New York for an order that the corporation issuing the stock show cause why it should not issue a new one instead of the one lost, do not conflict with the Constitution or statutes of the United States and may be invoked by a stockholder of a national bank who has lost her certificate of stock therein.

MOTION to modify an order requiring respondent bank to issue duplicate certificate of stock.

Louis F. Doyle, for motion.

Edo E. Mercelis, opposed.

BISCHOFF, J. The point in dispute touches the power of the Legislature to provide for the issuance of a certificate of stock by a national bank in the place of a certificate lost by the holder. Sections 50 and 51 of the Stock Corporation Law (L. 1892, ch. 688) are not restricted in their application to domestic corporations, and are so framed as to apply generally to any stock corporation coming within the jurisdiction of the court, but it is insisted that the respondent, because a national bank, is not to be affected by legislation of this kind.

In matters pertaining to their internal management, as Federal

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agencies, national banks cannot be controlled by State laws, nor can a State law prevail where the same subject is covered by an act of Congress, nor where the effect of the State law would be to impair the efficiency of these agencies in the discharge of the duties which they were created to perform (McClellan v. Chipman, 164 U. S. 347; Davis v. Elmira Sav. Bank, 161 id. 275; Waite v. Dowley, 94 id. 527), and the transferable quality of the bank's stock is a matter without the control of State laws, for the reason that the subject has been regulated by act of Congress (U. S. R. S., § 5139), which provides that the stock shall be "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association." Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. Repr. 369.

The present question, *i. e.*, the availability of a remedy given by a State statute to a stockholder who has lost his certificate of stock, does not relate to the transfer of stock nor to the negotiable character of stock when issued. The internal management or policy of the bank is not affected, and the remedy thus afforded to the stockholder does not subject the bank to any burdens which might touch it in its character as a Federal agency. The bank is not made liable, as upon a double issue, for the liability is transferred to the bond, and the requirement of the order in such a proceeding is not for an issue of stock, but for the furnishing of evidence to the stockholder of his actual holding. The proceeding is to enforce a right given by the statute, but the right is not in conflict with Federal laws, nor with any policy upon which the national banking system is founded, and in the enforcement of rights generally, whether based upon a statute or otherwise, the courts of this State have the same jurisdiction over national banks as over banks organized under State laws. The statutes of the United States provide: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations * * * shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun." U. S. Stat. 1882, chap. 290, § 4; and see Hiscock v. Lacy, 9 Misc. Rep. 598.

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The word "suit" comprehends not alone actions at law, but every judicial proceeding for the enforcement of a right (Bouvier L. Dict. ad verb.), and thus includes such a proceeding as this.

The order heretofore granted was not, therefore, beyond the jurisdiction of this court to make, but the motion for a modification will be granted so far as to provide for publication of notice, as sought by the moving party, an insertion of the notice in two papers, once a week for three weeks, being deemed sufficient.

Ordered accordingly.

CATHERINE M. DRESSER, Plaintiff, *v.* MARTIN V. B. TRAVIS, Individually and as Sole Surviving Trustee, Etc., of JOHN C. HART, Deceased, et al., Defendants.

(Supreme Court, New York Special Term, December, 1902.)

Partition — Not defeated by an intervening trust containing an inseparable void provision for accumulation — Illegal suspension of the power of alienation — Statute of Limitations — Adverse possession of trustee — Plaintiff not estopped by acquiescence — Trustee protected as to acts past — Family agreement — Sale.

A trust of real estate, created in 1872, devising the testator's real estate, in four described parcels, to his executors as trustees upon the trust to receive the rents etc., of the trust estate and out of the first proceeds thereof pay a mortgage on the only parcel that was mortgaged and also his debts, and thereafter pay the residue of the rents of each of the four parcels to each of his four adult surviving daughters for life, the remainder of each parcel to go in fee to the children of the daughter, is void because it is an accumulation of rents and profits not made for the benefit of minors and during minority, and also because it illegally suspends the power of alienation, since it might require a period longer than two lives in being to pay the mortgage and the debts.

Where the primary purpose of the testator in creating the trust appears to have been to divide its income equally among the four daughters for life, the provision for accumulation — necessary to pay the mortgage and debts and so make the shares equal — is so inseparably connected with the trust that that provision cannot be cut

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off, and therefore the whole trust is void. the four daughters take the *corpus* as heirs and as tenants in common and one of them may bring partition in 1901.

Such a cause of action being one which continues during their co-tenancy, the Statute of Limitations cannot run against the daughter who sues, as there never was a time when the statute began to run against her.

The surviving trustee, made a defendant, cannot set up adverse possession as he never had the fee but only a power to distribute the income.

The acquiescence of the plaintiff, for twenty-nine years, in the carrying out of the will, in receiving rents, in the accountings of the executors as such, as trustees, and in the accountings of the sole surviving trustee, do not estop her from suing; and, on the other hand, she cannot now question past acts of the trustees and trustee, or their disposition of the income, in which she has heretofore acquiesced.

The doctrine of an executed family agreement is inapplicable to the case of the daughters as no agreement can validate a void trust.

Where the four parcels are differently situated and are presently of unequal value, all must be sold since there can be no actual division of them which would be an equal one.

ACTION for partition.

Wilson M. Powell and John M. Scribner, for plaintiff.

John M. Bowers, for defendant Martin V. B. Travis, trustee, etc.

Thomas Nelson, for defendant Mary E. Travis.

John C. Travis, for defendants Viola H. Carpenter and Virginia H. Mills.

Edward Wells, for defendant John C. Travis.

Arthur Lovell, for defendant George H. Dresser.

T. Channon Press, for defendants McCauley and Ritter.

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CLARKE, J. Action brought under section 1537 of the Code of Civil Procedure for a partition or sale of the premises described in the amended complaint by a daughter and heir-at-law of John C. Hart, deceased, alleging that an apparent devise thereof in his will is void. On May 3, 1872, John C. Hart died seized of the premises described, leaving a will and two codicils, admitted to probate in Westchester county, June 5, 1872, and leaving a widow and four daughters, all of age at the time of their father's death. The widow is now dead, but the four daughters are all living. The testator, after directing the payment of all his just debts and funeral expenses, devised unto his executors the real estate in the city of New York owned by him, "hereinafter designated and described as parcels Nos. 1, 2, 3 and 4, and hereinafter denominated and referred to as 'trust estate,' and described as follows:" and thereupon follows the description of a number of different pieces of real estate, divided into four parcels. He then provided that if the title to any one or more of the said four parcels during the continuance of the trust should prove defective or become invalidated and the same be lost to and no longer form a part of his estate, then he directed his executors to divide the remaining portion of such trust estate in four equal shares, value and income of the same being considered, "and the shares of such division shall assume and bear the designation of the original parcels 1, 2, 3 and 4, and be represented and stand in the same distinctive relation to the trust as the original parcels. * * * To have and to hold the same in trust, to let and lease the same * * * to collect the rents, issues and profits of said trust estate, and out of the first proceeds thereof to pay off, cancel and discharge the mortgage now a lien upon said parcel No. 1 and such other liens, incumbrances and indebtedness to which the said whole trust estate at the time of my decease may be subject and charged with." Thereafter the residue of the rents of each of the four parcels was to be paid to each of the four daughters during her life. Upon their respective deaths each parcel was given to her children in fee. Upon parcel No. 1 there was a mortgage for $22,000. The other parcels were unincumbered. At the time the will was read, on the day of the burial. all of the four daughters and the executors and trustees were present. The conversations then and at frequent subsequent

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meetings were to the effect that the mortgage and debts must be paid before the daughters could receive any income, and that they must economize, live with their mother, and hasten the payment of the mortgage and debts. To this they all agreed and acted accordingly. The executors, in all these frequent interviews, explained the situation of the estate and their progress in carrying out the will. The mortgage on parcel 1 was paid in installments out of the rents, as well as all the debts of the estate. The mortgage being $22,000, the rest of the debts so paid made a total of $55,000. There is no question but that the family fully understood and acquiesced in this appropriation of income to payment of this indebtedness. All of the debts, including the mortgage, were fully paid by the 16th day of May, 1876. The executors filed their final account December 18, 1880, which was approved by plaintiff and the other beneficiaries in writing. The trustees have regularly accounted upon regular citations to the beneficiaries. The plaintiff either approved or failed to object to any of these accounts and always received and receipted for her portions. The entire conduct of the executors and trustees from the probate of the will has been spread in exact detail upon the records of the court, the facts have always been known, and their conduct has been continuously passed upon and approved by confirmatory decrees. After this acquiescence in and approval of the provisions of the will and the execution of the trust therein created from May, 1872, this action, after the decision by the Court of Appeals of Hascall v. King, was begun on October 23, 1901. And it is true that in the twenty-nine years in which this trust had existed, unassailed, by reason of the changes in the city conditions the value of the different parcels no longer represented the fair and equitable division of his estate among his daughters that the testator accomplished at the time of his death. The will directs the accumulation of rents for the purpose of paying off a mortgage on one parcel of the realty and for the purpose of paying the debts of the decedent. Such provision is void for two reasons. It has been definitely determined in Hascall v. King (162 N. Y. 134) that the application of the income of a trust estate in the payment of mortgages is an accumulation in violation of the letter and the spirit of the statute which prohibits the swelling of an estate by the accumulation of income except for

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the benefit of minors and during their minority. 1 R. S. 726, §§ 37, 38; Real Prop. Law (Laws of 1896, chap. 547), §§ 51, 76. The provision is further objectionable because there is a suspension of the power of alienation of the "trust estate" not limited by lives, but until the mortgage, incumbrances, and debts shall be paid. The realty was thereby rendered inalienable during such period as would be required to cancel these incumbrances. The absolute power of alienation may not be suspended for more than two lives in being at the creation of the trust estate. No suspension, however short, which is otherwise limited can be maintained. The period required to pay off the mortgage and the other debts from the rents may exceed the duration of the lives of any two persons, and therefore the creation of a trust term for that period is forbidden and must be declared void. Hone v. Van Schaick, 20 Wend. 564; Tucker v. Tucker, 5 N. Y. 408; Jennings v. Jennings, 7 id. 547; Hawley v. James, 16 Wend. 61; Boynton v. Hoyt, 1 Den. 53. And it has been expressly held that a trust limited until the payment and extinction of certain mortgages is void. Killam v. Allen, 52 Barb. 605; cited with approval in Underwood v. Curtis, 127 N. Y. 523, and Williams v. Lande, 74 Hun, 425. It appearing that the provision for accumulation is void, the further inquiry is necessary whether or not it is so connected with the entire trust provision as to render the whole void. It is a familiar principle that when the main object of the trust is valid and when the incidental and subsidiary provisions which are invalid may be cut therefrom without affecting the trust itself, that the general plan of the testator will be preserved, but when the invalid portion cannot be separated from the valid provisions without defeating the primary object of the testator the will must fail. Kalish v. Kalish, 166 N. Y. 368; Hascall v. King, 162 id. 134; Matter of Butterfield, 133 id. 473; Cowen v. Rinaldo, 82 Hun, 479; Tilden v. Green, 130 N. Y. 29. The principal object which testator had in mind was to divide his real estate included in the "trust estate" into four parcels, "four equal shares, value and income of the same being considered," so that his four daughters should obtain therefrom an income which should be equal or nearly equal for their several lives. For the purpose of effectuating his plan he directed the payment of the mortgage on parcel No. 1 and of the debts out of

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the rents of the whole trust estate. This direction is so much a part of the primary intention that without it the plan could not be put into effect, for without such payment the shares of the daughters would not be equal. It, therefore, clearly appears that the direction to accumulate cannot be cut out or lopped off and leave the remainder of the trust operative, for if we attempt to separate it from the subsequent trust we destroy the testator's primary intent. The cases cited by the defendants are clearly distinguished by the fact that the invalid portion was separable from the valid. Hafner v. Hafner, 62 App. Div. 316. In Kalish v. Kalish, 166 N. Y. 368, an intermediate trust, which was declared invalid because in contravention of the statutes against perpetuities and unlawful accumulations of rents and income, was lifted out of the will and the first and third provi sions were held valid. Judge Werner said: "The void intermediate trust is for the benefit of the same legatees who take under the ultimate trust and remainders respectively. The excision of the void trust simply gives immediate effect to those ulterior devises which under it were to be postponed for five years. The same persons take in the same proportion as before." In Hascall v. King, 162 N. Y. 134, Chief Judge Parker said: "The primary object of this testator, by the creation of this trust, was to provide an income for his wife, the accumulation for the purpose of paying the mortgages being secondary. Indeed, nothing was to be applied in payment of the mortgages until after the sum named by this testator should in each year be paid in full to his wife, the disposition of the balance being a mere ulterior contingent direction, entirely distinct from the primary trust." In the case presented it is impossible to lift the provision for the accumulation and still carry out the intention of this testator to provide an equal division among his daughters. The very purpose of the accumulation was to render the division equal, and if this accumulation fail the plan of the testator cannot be carried out. As Mr. Justice Ingraham said in Clemens v. Clemens, 60 Barb. 366: "It seems to me that these provisions are so connected with the whole trust, and dependent upon their connection with the residue, that no part of the trust could be carried out without working injustice and giving to a portion of the family a larger share of the estate than was intended, if the

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whole trust could have been sustained." The provision in the will for the trust estate is, therefore, void. As to that portion of the estate, the testator died intestate and the four daughters inherited the property therein specified as heirs-at-law and are tenants in common. An action for partition of the property may be maintained under section 1537 of the Code of Civil Procedure. The cause of action is a continuing one so long as the cotenancy exists. There can be no bar to this action as urged by the defendants because of the Statute of Limitations, for there has been no time when the statute has begun to run against the plaintiff. Neither has there been any adverse possession in the trustee. His possession has been avowedly under the devise and the possession of the trustee is the possession of the *cestui que trust*. The trustee could not obtain title by adverse possession, for he never has had the fee. He has merely distributed the income, allowing to others the possession and use of the land, and he would have only the interest required for the purposes of the assumed trust. As in Nicoll v. Walworth, 4 Den. 385, the rents and profits of the land were received and applied to the support of the beneficiary. The case is distinguishable from Bennett v. Garlock, 79 N. Y. 302, where there was a trust to sell necessitating a fee in the trustee. The defendants further contend that the plaintiff is estopped from questioning the devise because she has acquiesced in carrying out the provisions of the will, receiving rents of her share for many years, and never objecting to the annual accountings in the Surrogate's Court. There is no estoppel. An heir-at-law is not estopped by any proceedings in the Surrogate's Court from attacking the validity of the will as expressly provided in section 1537 of the Code of Civil Procedure. Corley v. McElmeel, 149 N. Y. 228; Bowen v. Sweeney, 89 Hun, 359, affd., 154 N. Y. 780. Moreover the requisites of an equitable estoppel are not found in this case. The plaintiff has not, with knowledge, intentionally induced any persons ignorant of the facts to suffer loss. She has silently received for many years less than her share of the property. But it is difficult to see how her acquiescence could in any event have affected her status. She is an heir from the time of the decedent's death. Her participation in the distribution of the income of the property does not alter her right as heir to a divi-

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sion of the principal. It is urged that this is a case where there is a family agreement as to the disposition of the decedent's property, and that, as the plaintiff was a party to such agreement, she is bound thereby. In Shimmel v. Morse, 30 Misc. Rep. 257, cited in support of this contention, the plaintiff merely consented to an improper manner in which the trust created was executed by the executor. It was held that, having participated in the manner of its accomplishment and received material advantages flowing from her assent, she could not attack its validity. The devisees under a valid will there undertook to dispose of the property in an improper manner. No case has been cited in which the provisions of an invalid will have been held binding because the devisees acquiesced in the carrying out of such provisions. In the case at bar the plaintiff has acquiesced in the distribution of income of property in which she thought she had the devise of a life estate, whereas she has inherited the fee. By such acquiescence the invalid provision in the will cannot be rendered valid and a fee converted into an estate for life. The effect of the participation of the plaintiff in the arrangements which have been put into effect and of her acquiescence in the surrogate's accountings has been to settle the trustees' accounts, and preclude the heirs from questioning the disposition of the income up to the commencement of this action. The rule in that regard is well stated in Killam v. Allen, 52 Barb. 614: "The surviving executor and trustee must be discharged from his trust upon a proper accounting to be had before a referee, to be appointed under an order to be entered for that purpose. Upon such accounting he must be charged only with such moneys as may remain in his hands unexpended in the execution of the trust. For while all parties acquiesced in its validity, the trustee must be protected in all that he did in good faith for the purpose of executing it." It appearing that there are no infants, that the property included in the trust estate is variously situated and of unequal value, let judgment for the plaintiff, decreeing partition, be entered, directing that the said property be sold, subject to a lease of No. 972 East Ninth avenue to the defendants McCauley and Caleb, made when the acting trustee was in charge of this property under the will and before this action was commenced. The proceeds of the sale of all the said property shall

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be divided into four equal parts. The plaintiff and the defendants Travis, Carpenter, and Mills are each entitled to one-fourth part. Costs to the trustee and four sisters payable out of the estate.

Judgment accordingly.

JOHN HARE et al., as Administrators, Etc., Plaintiffs, *v.* ARTHUR B. DE YOUNG et al., Defendants.

(Supreme Court, New York Special Term, December, 1902.)

Judgment — Action to compel its extinguishment — Abuse of confidential relation.

Where the attorney for an estate acts at the same time, for a fee, for purchasers of a judgment against the estate one of whom, the instigator of the purchase, occupied the same office and was associated in law business with him, with the result, that the judgment, although considered by all parties enforcible at its face, is purchased at a discount, the administrators of the estate are entitled to have it satisfied upon repaying the sum paid for it with four per cent. interest.

ACTION to compel the extinguishment of a judgment against plaintiffs' intestate purchased by defendants from the judgment creditor.

White & Case (J. Du Pratt White, of counsel), for plaintiffs.

Thomas Bracken and Samuel R. Taylor, for defendants.

KEENER, J. This action is brought to compel the extinguishment of a judgment against the plaintiffs' intestate purchased by the defendants De Young and Ottmann from the judgment creditor. The judgment was bought by the defendants above mentioned on the suggestion of the defendant De Young. Prior to and at the time of the purchase of this judgment, De Young, who was an attorney-at-law, occupied an office jointly with one B. Gerson Oppenheim, also an attorney-at-law, who at that time and at the times hereinafter referred to was acting as counsel for the plaintiffs as administrators of the estate of James Pryor,

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deceased. Before the purchase of this judgment by the said defendants, frequent interviews had been held in the office of Oppenheim, in the presence of De Young, in reference to the validity of this judgment and its priority over other claims. Negotiations looking to the compromise of this judgment had also been had in the presence of De Young. As a result of these consultations, it had been determined that the judgment was a valid claim against the estate and had priority, and that the estate was sufficiently solvent to pay it. The evidence also establishes that the plaintiff Glackner, prior to the time of the purchase, had refused to make further efforts to compromise the judgment and had stated that he would pay the same only under a proper direction of the court. These facts were all known to De Young at the time when he suggested to Ottmann the desirability of purchasing the judgment and were understood by Ottmann. As a result of a negotiation between Ottmann and De Young, the judgment was finally purchased from the creditor, the National Broadway Bank, for the sum of $7,200, in the name of Ottmann for the joint benefit of Ottmann and De Young. An order was obtained after such purchase directing the plaintiffs to pay the judgment to the National Broadway Bank, and the defendant De Young, acting for himself and for the defendant Ottmann, presented the claim to the plaintiffs for payment and the plaintiffs, on the suggestion of De Young and their counsel, Oppenheim, drew a check for $9,930.05 for the payment of the same, neither De Young nor Oppenheim disclosing to the plaintiffs the fact that the bank, the original judgment creditor, had assigned it to De Young and Ottmann. This check has never been paid.

While the evidence does not justify the conclusion that De Young stood in the technical relation of clerk to Oppenheim, it fully establishes that each rendered services to the other as either needed them, Oppenheim in the capacity of counsel and De Young as an assistant. In the matter of the claim now under consideration, the defendant De Young did in fact assist Oppenheim and thus became familiar with the facts causing him to advise its purchase by Ottmann on behalf of Ottmann and himself. It is further established to my satisfaction that Oppenheim, while still acting as counsel for the plaintiffs as administrators as afore-

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said, acted as the counsel for the defendants De Young and Ottmann in the purchase of this claim, and that he received as a fee therefor the sum of $300 through the defendant De Young, though it does not appear that the defendant Ottmann was aware of the fact of the payment of this fee and the evidence would seem to establish the fact that the defendant Ottmann understood that the claim was to be purchased for $7,500 instead of $7,200.

It is clear that had Oppenheim, the counsel for the plaintiffs, purchased this claim at a discount, the plaintiffs would have had a right to require its extinguishment on reimbursing Oppenheim. Carter v. Palmer, 8 Cl. & Fin. 657, 707; Tyrrell v. Bank of London, 10 H. L. Cas. 26, 44. The relation of De Young to Oppenheim as an assistant and business associate would have been equally fatal to De Young's collecting the face value of the claim had he been its purchaser at a discount. Hobday v. Peters, 28 Beav. 349; Poillon v. Martin, 1 Sandf. Ch. 569, 574. De Young and Ottmann can be in no better position as joint purchasers, since all the facts were known to Ottmann that were known to De Young. Furthermore, as De Young was representing him in the purchase, the knowledge of De Young must be imputed to Ottmann. Fulton v. Whitney, 66 N. Y. 548, 557. That the plaintiffs had refused to negotiate further for a compromise and had declared that they would not pay the judgment except under an order of the court, does not aid the defendants. The evidence does not establish that they were unwilling to pay a sum less than the claim in extinguishment thereof, if an order of the court was obtained directing payment. But even if it should appear that the plaintiffs were determined to pay all or nothing on the claim, that would not justify the conduct of Oppenheim and De Young. The rule forbidding a party standing in a relation of confidence to another from taking a position antagonistic to the interests of such other, forbids all such transactions without the fullest disclosure, even though in a given instance it can be shown that no injury whatever was done. Howell v. Ransom, 11 Paige, 538; 1 N. Y. Leg. Obs. 10; Dutton v. Willner, 52 N. Y. 312. Were this not the rule, much fraud might be perpetrated by the abuse of confidence and trust relations which it would be impossible to prove by satisfactory evi-

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dence in court. This rule obviates this difficulty and lessens the temptations to which the weak might otherwise be subjected. Disagreeable as is the task, I should be shirking my duty if I did not condemn in unequivocal terms the disingenuousness of the two attorneys mentioned, and their failure to have a proper regard for the obligations imposed upon them as officers of this court.

I am of the opinion that the plaintiffs are entitled to have the judgment satisfied of record on the payment by them to the defendant Ottmann of $7,200, the sum paid by the defendants to the creditor, with four per cent. interest from December 4, 1901, with costs and an extra allowance of $250 to the plaintiffs. Settle decision and final judgment on two days' notice.

Judgment accordingly.

THE PEOPLE ex rel. THE STANDARD WATER METER CO., Relator, v. ROBERT GRIER MONROE, as Commissioner of Water Supply, Etc., Respondent.

(Supreme Court, New York Special Term, December, 1902.)

New York city — Commissioner of water supply's discretion as to the kind of water meter to be used in the city.

Under the charter of the city of New York (L. 1897, ch. 378, § 475, as amd. L. 1901, ch. 466), the commissioner of water supply has discretion as to the kind of water meter to be used in the city and while he cannot cause to be placed in a building a water meter which the board of aldermen has not approved as to pattern and price, he cannot be compelled to permit to be placed in a building a water meter, although so approved by the board, which the tests of his experts have shown to be inherently defective when applied to the proposed use and under such conditions of pressure and flow as obtain in the city.

MOTION for a peremptory mandamus.

G. E. Waldo, for relator.

George L. Rives, Corporation Counsel (Arthur Sweeny, of counsel), for respondent.

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SCOTT, J. This is a motion for a peremptory mandamus directing the commissioner of water supply, gas and electricity of the city of New York to test a water meter for a customer of the relator, under Rule 13 of the department, and, if the test is satisfactory, to grant a permit for the installation of the meter. The relator is a manufacturer of water meters, and makes two kinds of meters, one known as the disc meter and one known as the current meter. The present motion has reference to the so-called current meter. Section 475 of the Greater New York Charter (L. 1897, ch. 378), as amended by chapter 466, Laws of 1901, provides that: "The commissioner of water supply is authorized, in his discretion, to cause water meters, the pattern and price of which shall be approved by the board of aldermen, to be placed in all stores, workshops, hotels * * * and in all places in which water is furnished for business consumption, and if authorized thereto by resolution or ordinance of the board of aldermen, in all apartment houses, tenements, flat houses and private dwellings, so that all water so furnished therein or thereat may be measured and known by the said department, and for the purpose of ascertaining the rateable proportion which the consumers of water should pay for the water, therein or thereat received and used." Rule 13 of the department provides as follows: "All meters before being placed must be sent with the owner's or purchaser's name, residence and place of business to the department pipe yards to be tested. They will be returned within forty-eight hours, upon the written order of the owner, giving the name of the plumber who is to receive and set the meter." The relator shows that its current meters have been approved as to price and pattern by the board of aldermen, that the customer named has purchased two of them, and that the respondent refuses to test the two so purchased. The answer of the respondent is that he has caused many of the current meters manufactured by the relator to be tested, and that he has found them to be unreliable both as to accuracy and endurance; that he believes said meters to be unfit for use under conditions such as exist in this city, and that, even if the particular meters said to have been purchased should apparently respond to the tests to be applied to them in the pipe yard, still he should deem it unwise to permit any meters of that description to be installed.

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Hence, as he says, it would be futile to test the meters. It appears that in January of the present year the relator applied to the then commissioner of water supply for leave to sell its meters in this city. This application referred to both disc and current meters. The commissioner, on January twenty-second, addressed a communication to the board of aldermen recommending for approval the pattern and price of water meters manufactured by relator, stating that these meters had been tested and found to be reliable, accurate, and durable. There seems to be some reason to believe that the commissioner only intended to include the relator's disc meters in this recommendation. However that may be, at his suggestion further tests of the current meter were made, and the results, which the respondent and his engineers declare to have been unsatisfactory, were submitted to the board of aldermen. On July 7, 1902, the board adopted a resolution approving relator's water meters as to price and pattern. This resolution seems to have applied to both disc and current meters. Subsequently a further number of current meters were tested under the direction of the respondent, and again, as he claims, they proved to be inaccurate and unreliable. The question at issue turns upon the meaning to be given to the charter provision that "the commissioner of water supply is authorized, in his discretion, to cause water meters, the price and pattern of which shall be approved by the board of aldermen to be placed in all stores," etc. That he has an undoubted discretion to determine in what particular buildings, of the character enumerated in the section, water meters shall be placed is undoubted. The relator insists that this is the limit of his discretion, and that, having determined that a meter shall be placed in a building, he is bound to permit any meter to be placed therein that the owner may prefer, provided only that it be of a style or make, the pattern and price of which has been approved by the board of aldermen, and subject to a brief test, not exceeding forty-eight hours, of the particular meter sought to be installed. The respondent, on the other hand, contends that his discretion is much wider, and extends to the pattern of meter to be used, subject only to the qualification that he may not approve or authorize any meter unless it has been approved as to price and pattern by the board of aldermen. In other words, that while

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he may not authorize any meter not approved by the board, his judgment as to the propriety of using a particular pattern of meter is not taken away or controlled by the board, but that a meter to be used must be approved both by himself and the board of aldermen. It is to be noted that the purpose of using water meters is declared by the statute to be that the water used may be measured and used by the department, and that the consumers thereof shall pay therefor ratably. To achieve these ends it is necessary that the meters to be used shall not only be accurate for a short period, but that they shall be of a pattern which will insure durability and continued reliability. Given a pattern which has been shown to usually possess these attributes it is reasonable that a short test may be all that is necessary to show that a particular meter of that pattern is fit to be used. It is conceivable however that meters may be made which from inherent defects in their general design are likely to prove to be inaccurate and unreliable after continued use, although individual meters might appear to respond favorably to short tests. Whether a meter is thus inherently defective in design is a matter which can only be determined by trained experts, who have had experience in such matters. The charter contemplates that the commissioner of water supply shall have at all times in his department expert engineers to advise upon just such questions as this. He is therefore provided by law, with the means of acquiring such information as may be necessary to enable him to determine whether or not any pattern of meter is one which is calculated to achieve the purposes prescribed by the charter, and therefore whether or not the public interests would be conserved by its use. The board of aldermen are not elected for their scientific attainments, and are not provided by law with expert advisers. It would require a very clear reading of the statute to induce the belief, that upon so highly technical and scientific a question as the sufficiency of the plan or pattern of a water meter, the Legislature intended to intrust the ultimate answer to the board of aldermen, to the total exclusion of the commissioner of water supply and his trained staff of experienced engineers. In my opinion the charter does not require such a reading, or justify such a conclusion as to the intention of the Legislature. On the contrary all that the Legislature meant, as I construe the stat-

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ute, was that the board of aldermen should act as a check upon the commissioner so as to prevent him from imposing upon consumers meters of too cumbersome a design, or of too high a price, leaving him as between the patterns approved by the board, free to exercise his own discretion as to which meters would satisfy the requirements of the section quoted. This view of the intention of the Legislature is confirmed by the course of legislation upon the subject. By section 13 of chapter 283 of the Laws of 1870 the commissioner of public works was left free to select any meter "of approved pattern and suitable for the purpose." By the charter of 1873 (Laws of 1873, chapter 335, § 13), the pattern and price of water meters were required to be approved by the mayor, comptroller, and chief engineer of the Croton Aqueduct, and this provision was re-enacted and continued by the Consolidation Act (Laws of 1882, chapter 410, § 352). By the first charter of the Greater New York it was required that the price and pattern should be approved by the board of public improvements, and by the present charter the power of approval is given to the board of aldermen. Thus as will be seen the power to approve price and pattern was first given to the commissioner alone, then to a board comprising one expert engineer and two laymen, then to a board composed of six commissioners presiding over departments employing engineers, and nine officers not necessarily employing expert assistants, and finally the power is lodged in a legislative body. Thus the Legislature has gradually withdrawn the matter of the approval of price and pattern, more and more from those, who from their official positions might be supposed to be able to pass upon the technical and scientific questions involved in the selection of a proper water meter. I cannot believe that it has been the persistent policy of the Legislature to submit the final determination of a purely scientific question to successive bodies not presumptively possessing scientific knowledge and experience. It seems much more reasonable to assume that the purpose has been to establish a check upon the power of the commissioner to impose upon consumers extravagant expenditures for meters. The affidavits show that the respondent has acted in perfect good faith, and after numerous tests has concluded that current meters are inherently defective when applied to house uses under such conditions of pressure and flow as obtained in this

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city. In this opinion he is sustained and fortified by the expert opinion of the engineers of his department. In refusing to consent to the installation of such meters he is acting, in my opinion, within the discretion vested in him, and that discretion the court will not review.

Motion denied with ten dollars costs.

Matter of the Application of HENRY KEEN.

(Supreme Court, New York Special Term, December, 1902.)

Attorney — Must account to the client for his money.

Where attorneys receive, in their capacity as such, moneys of a client they must account to him for all of it except a reasonable sum for counsel fees and disbursements.

The right to an accounting will not be denied him because of their interposition of technical objections.

MOTION by applicant Keen for an order requiring S. Victor Constant and Linus A. Gould to turn over moneys received by them belonging to him.

J. Hampden Dougherty, for petitioner.

Robert L. Wensley, for respondent Gould.

SCOTT, J. The applicant is a foreign tailor having customers in this county. In October, 1899, he was represented here by an agent named Hutchings, who, on or about October fourteenth of that year, was arrested upon a charge of criminal violation of the Federal revenue laws. Hutchings seems to have intended to retain the service of the respondent Constant, but as the latter was out of town his call for assistance was at first responded to by a Mr. Bogle who appears to have been the representative of Mr. Constant. At Bogle's request Hutchings cabled to his employer Keen for the sum of $2,000, to be used for the indemnification of bail. This sum was forwarded by a draft to Hutchings' order upon a

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banking-house in this city. Bail was given by Hutchings on October 16th, and then and thereafter the respondent Gould appeared and acted as counsel for him, but Bogle, whose only connection with the case was that he represented Constant, appeared at all the hearings. At about the time that Gould took active charge of the matter, Hutchings endorsed and delivered to him the draft for $2,000, which he afterward cashed and deposited in his own bank account. Constant returned to the city early in November and seems to have thereafter undertaken to keep the applicant Keen advised of the progress of the proceedings. The defenses urged against the prayer of the applicant are technical, and not always wholly ingenuous. First it is insisted by Mr. Constant that he received no part of the money, and had no connection with the case except as the disinterested friend of all the parties. Mr. Gould also tries to absolve Mr. Constant from any responsibility in the matter. It may be, and doubtless is true that Mr. Constant did not receive any of the money, but this does not wholly clear him from responsibility to account for it. He, through his representative Bogle, was the first person to act in the matter, and it was at Bogle's suggestion, made as Constant's representative, that Keen was induced to send the money to Hutchings. So it was directly a result of the advice or suggestion of Constant's representative that the applicant Keen was first induced to part with his money. The precise relation between Constant and Gould is not clearly disclosed. They occupy parts of the same suite of offices and their relations appear to be intimate. In letters written to Keen, before any question arose as to who should account to him for his money, Constant wrote as follows: "While I was away Mr. Hutchings was arrested as you were duly notified; Mr. Bogle who appeared for him is a lawyer associated with me — as is Mr. L. A. Gould who wrote you later," etc. In the same letter he says: "We do not know how strong a case the government will be able to make; * * * to-morrow at the hearing we will get at some of their case," etc. In a later letter Constant writes: "We have every hope that they will not be able to substantiate their case." In a still later letter he says: "I happened to be out of the city on the Saturday when Hutchings was taken before the commissioner and in my absence Mr. Bogle appeared. At the subsequent hearings it seemed to me advisable to have Mr.

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Gould appear as the attorney of record for the reason that my name was on the books taken from Mr. Hutchings at the time as being one of his customers." In the same letter Mr. Constant said: "As Mr. Gould has already written you the amount expended, including the amount retained by us for our expenses in the matter amount to $1,500, and as Mr. Gould has forwarded you his check for the $500 balance, it will clear up the whole matter to your satisfaction. Mr. Hutchings had an idea in a recent conversation that we could return to you the whole $2,000 and then make some charge for our services, but as the matter developed, the course pursued by us seemed the best." In the face of these declarations I cannot absolve Mr. Constant from responsibility for the disposition of the money, or accept his present statement that there was no relationship between himself and Mr. Gould with regard to the expenditure of the applicant's money. I deem it to be established by Mr. Constant's own statements that he and Mr. Gould were associated in the defense of Mr. Hutchings and jointly liable to account for the disposition of the applicant's money. It is perfectly obvious that both Mr. Gould and Mr. Constant knew from the very beginning that the money was Mr. Keen's and considered that in defending Hutchings, they were in reality acting on Keen's retainer, and quite as much for his benefit as for the benefit of Hutchings. I am not disposed on a motion of this character to accede to the contention made on behalf of Mr. Gould that the legal title to the money passed from Keen to Hutchings before it was paid over, and hence that technically it was Hutchings' money, and not Keen's, which the respondent received and retained. Every act of Gould and Constant indicates that this theory is an afterthought, never entertained until this proceeding was instituted. It would be a reproach upon the power of the court to supervise the conduct of its own officers if the applicant should be denied an accounting upon such highly technical objections as are interposed here. My conclusion is that the respondents acted as attorneys for the applicant, and received his money in that capacity, and should account to him for all of it except a reasonable sum for counsel fees and disbursements. Unfortunately the papers furnish no information upon which I can estimate how much the defendants should be permitted to retain. Neither side shows in detail what services

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were rendered or what expenses were incurred. The applicant makes an estimate of the value of respondents' services, but obviously he is not qualified to form an estimate on this subject. The respondents, who have all the knowledge upon the subject, give no details and content themselves with general statements and mysterious suggestions of extraordinary efforts and expenditures which they were compelled to make. I see no alternative except to appoint a referee to take evidence as to the fair value of respondents' services, and the amount of their reasonable expenditures. I take this course with hesitation because the expense of a such a reference may be out of all proportion to the amount which will probably be recovered. If the applicant hesitates to incur this expense he may, if he so elects, discontinue this proceeding without prejudice to an action.

Ordered accordingly.

Matter of ALMA LOUISE LARNER, an Incompetent Person.

(Supreme Court, New York Special Term, December, 1902.)

Incompetent person — Allowance made to her committee for successfully resisting attempts to procure her freedom.

Where a woman, adjudged an incompetent, applies to the court for the discharge of the committee of her person and that she be restored to personal liberty of action, and this upon the ground that she has completely recovered her mental health, and the court thereupon orders her committee to show cause why she should not have such relief, and a decision adverse to her is reached both in the proceeding taken for the discharge of her committee and in a subsequent proceeding taken in another judicial department by *habeas corpus*, the committee of her person is entitled to be allowed out of her property reasonable disbursements and counsel fees, which he paid or incurred, in both proceedings.

MOTION to confirm referee's report.

MacFarland, Taylor & Costello, for Alma Louise Larner.

Blandy, Mooney & Shipman, for Henry L. Goodwin, committee, etc.

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SCOTT, J. In May, 1900, Mrs. Larner was adjudged to be an incompetent person and one Henry L. Goodwin was appointed committee of her person, and the Farmers' Loan & Trust Company, committee of her estate. On February 11, 1902, the incompetent presented a petition to this court asserting that she had completely recovered her mental health and self control, and asked that the law firm of MacFarland, Taylor & Costello, of this city be authorized to represent and act for her in an inquiry into her condition to the end that the court should make such order thereon as, after investigation, might seem to be proper. Thereupon an order was made by a justice of this court authorizing the retainer of the law firm named by the incompetent, and ordering Henry L. Goodwin, committee of the person of the incompetent to show cause why the relief asked for by the petition, affidavits and certificate attached to the order should not be granted. This relief was, in effect, that the committee of the person should be discharged and the incompetent be restored to her personal liberty of action. Upon the return of the order to show cause the committee of the person appeared as he had been directed to do, and undertook to show cause why the prayer of the petition should not be granted. The court thereupon framed two questions which were sent to be tried before a jury and were so tried and resulted in a verdict adverse to the incompetent. The committee appeared on this trial by counsel, and produced witnesses, both lay and expert, as to the alleged recovery of the incompetent. After the rendition of the verdict by the jury *habeas corpus* proceedings were instituted in another department for the purpose of obtaining the release of the incompetent from the custody of her committee, and said committee of the person appeared and resisted the proceedings. In all these matters the committee incurred large expenses, including a considerable sum for counsel fees. In due course the committee of the person presented a petition to this court for an order directing this payment, from the funds of the incompetent in the hands of the committee of her estate, of a suitable sum to be allowed for the services of counsel and for the disbursements paid or incurred by the committee. Upon this petition an order of reference was made, and the referee has now reported the reasonable value of the services of counsel retained by the committee of the person, and the reasonable amount of his

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expenditures. The present motion is to confirm this report and to direct payment of the sums therein recommended out of the property of the incompetent. The motion is opposed by the attorneys who were designated by the court as those whom she might retain to conduct the proceedings for her release from tutelage, and by the special guardian appointed to represent her by the order which appointed the referee. No objection is made to the reasonableness of the sums reported, but it is insisted that the committee of the person had no authority to retain counsel and incur expense in opposing the release of the incompetent. The authorities are abundant wherein it has been held that an allowance may properly be made out of the estate of an incompetent person, for the compensation of one who, in good faith, sought to secure her release from the restraint imposed by an inquisition, and this although the incompetent could not make a valid contract to pay for such services. Carter v. Beckwith, 128 N. Y. 312; Matter of Larner, 68 App. Div. 320. It is objected that in these and like cases the services had been rendered in behalf of the incompetent while, in the present case, the services for which compensation is sought were hostile to her. This contention rests upon the assumption that every effort to release an incompetent person from restraint is of necessity friendly, and every effort to continue the restraint is unfriendly. This proposition will not stand examination. It may well be that the most cruel and unfriendly thing that could be done to an incompetent would be to free him from all restraint, and the most beneficent and kindly thing, to continue him subject to restraint. The verdict of the jury in the present case would seem to indicate that the best interests of the incompetent required that she should be kept under proper restraint. The principle under which allowances have been made out of the estates of incompetents undoubtedly is that such persons are wards of the court, and that in order to set the court in motion and properly advise it with reference to the exercise of its powers, it is necessary that counsel should be retained and proof of facts adduced. It is said, however, that the committee of an incompetent person is merely the agent of the court, without power to impose any expense on the estate of the incompetent without the consent and order of the court. As was said in Matter of Otis, 101 N. Y. 585: "He (a committee) is a mere bailiff to take

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charge of the property of the lunatic, and to administer it subject to the direction of the court. His possession is that of the court." I may say in passing that the court did not, in that case, use the following words, which in the brief presented by counsel for the incompetent are included in the quotation as if taken from the opinion. "And, of course, that direction must be obtained in advance of action. A committee cannot administer out of his own head and ask for authority *nunc pro tunc*." It is argued, and I think with much force that the committee was in fact directed to incur such reasonable expense as might be necessary, to lay before the court the true facts as to the alleged recovery of the incompetent. This direction is found in the order to show cause which initiated the proceeding and by which the committee was ordered to show cause why the incompetent should not be set at liberty. The application was in effect that the court should abandon its wardship over the person of the incompetent. Before complying with this petition it was the duty of the court to ascertain the facts as to the alleged recovery. To this end the committee, the agent and representative of the court, without any application or request on his part, was ordered to show cause, if cause there was, why the applicant should not be released. To this order the committee was bound to respond, and it was his duty to take such steps as might be reasonably necessary to lay the exact facts before the court. This necessarily implied the retainer of counsel, and the production of witnesses. It does not appear that the committee exceeded its duty in this regard. On the contrary, no question is made as to the reasonableness of his expenditures, and the course he pursued seems to have been vindicated by the result. It was equally, in my opinion, his duty to resist the release of the incompetent on *habeas corpus*. She had been intrusted to his care; his own opinion that she had not recovered had been confirmed by the verdict of a jury, and he certainly would have been subject to censure if he had stood silently by, and permitted the court to act without the advantage of hearing the reason which seemed to argue against a release. Even if the order to show cause had not contained a direction to the committee to appear in opposition to the application, still this motion should be granted. It is not questioned that the court could in advance have authorized the committee to retain counsel and summon witnesses. What it

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could thus have authorized in advance it can now approve. The result of the proceeding justified the attitude taken by the committee, the expenses he incurred are found to be reasonable and there is no evidence whatever that he acted in bad faith or otherwise than in what he believed to be for the best interest of his charge. The result is that the motion must be granted.

Motion granted.

ROSA SCHRIEBER, Plaintiff, *v.* RACHEL GOLDSMITH and DAVID GOLDSMITH, Defendants.

(Supreme Court, New York Special Term, December, 1902.)

Deed of gift — Reformation — Pleading the Statute of Limitations.

Proof that a mother who intended to give only the reversion, after her death, in her real estate to her daughter — as her daughter understood — executed and delivered a deed which, by the mistake of the scrivener, first gave the daughter a fee absolute and then attempted to cut it down by certain repugnant provisions in favor of the mother during life, presents a proper case for reformation of the deed to the end that it may correctly express the real agreement and intention of the parties.

The provisions of Code C. P., § 388, that "An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues" are not sufficiently pleaded by the defendants' allegation "That the statutory period in which to begin such an action as is here brought, to wit, ten years, has long since expired, and that this action is consequently outlawed".

Such an answer contains no averment that more than ten years have elapsed before the commencement of the action since the cause of action accrued.

In such case the statement that the action is "outlawed" adds nothing.

ACTION for the reformation of a deed.

House, Grossman & Vorhaus, for plaintiff.

Epstein Brothers, for defendants.

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SCOTT, J. This is an action for the reformation of a deed, and is brought by a mother against her daughter and the husband of the latter. In the year 1888 the plaintiff, a widow, was the owner of a house and lot in East Sixty-second street in the city of New York, and had been such owner for a number of years. At the time of making the deed in question (December, 1888), the defendant Rachel Goldsmith was between seventeen and eighteen years of age, still unmarried, and living with and supported by her mother. The plaintiff, being anxious to make some sure provision for her daughter's future, and after consultation with her brother, instructed an attorney to prepare a deed which should provide that, after her death, her daughter should have the property, the plaintiff meanwhile reserving full control and management as long as she lived, and that the daughter should not have power to sell or mortgage the property during plaintiff's lifetime, but that she (the plaintiff) should have the full control and benefit thereof. The attorney drew the deed in question, and called upon the plaintiff and read it to her, in the presence of her daughter. After the reading the plaintiff requested the lawyer to explain the deed to her, as she did not understand English well. He undertook to explain it and stated that its purport was that the house was plaintiff's as long as she lived, and that after her death it went to her daughter; that the plaintiff had full control of it and could rent it or do anything she saw fit. At this time the plaintiff did not live in the house, but rented it. In 1890 she and her daughter moved into the house and occupied it, plaintiff paying the expense of maintaining it. In 1893 the daughter married the defendant David Goldsmith. Thereafter and until 1900 the parties all lived in the house together, the plaintiff paying the taxes and water rates, the defendants paying the expense of running the house and of such repairs as were necessary. In 1900 the parties quarreled, and then for the first time the plaintiff learned that there was a question whether or not the deed as it was drawn was effectual to reserve a life interest in the property in her. The conveyance to the daughter was a purely voluntary act on the part of the plaintiff, resting on no substantial consideration except her love and affection, and was not the result of any previous agreement or understanding between the mother and daughter. The

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latter was a mere passive recipient of her mother's bounty, apparently never read the deed, and knew nothing of its contents or effect except as it was explained by the lawyer who read it. The deed, which was the usual bargain and sale deed, conveyed the property to Rachel Schrieber absolutely, the habendum clause reading as follows: "To have and to hold all and singular the above mentioned and described premises, unto the said party of the second part (Rachel Schrieber, now Goldsmith) her heirs and assigns forever, subject however to the right of the party of the first part (Rosa Schrieber) which she hereby reserves to herself to have the sole control and management of said premises, and to have and take the rents, issues and profits of said premises during her natural life and upon the further condition that the said party of the second part, her heirs or assigns will not, nor shall at any time during the lifetime of the said party of the first part sell, mortgage or otherwise dispose of said premises without the consent in writing of the said party of the first part thereunto had and obtained. And upon the further condition that in the event of the death of the said party of the second part before the death of the party of the first part said premises to revert unconditionally to said party of the first part, her heirs, or assigns." I have no doubt upon all the evidence in this case that it was the purpose and intention of the plaintiff to retain a life estate in the property, conveying to her daughter only the reversion after her own death, and that if the deed did not effect this, the error was that of the scrivener who prepared it. That the purpose was not effectually attained is conceded by all the parties and seems to be quite clear, because the attempted reservation is repugnant to the premises of the deed and therefore void. Mott v. Richtmyer, 57 N. Y. 49. Under these circumstances the plaintiff is entitled to a decree for the reformation of the deed. It is not necessary that there should have been a mutual mistake on the part of both the plaintiff and her daughter. There was no mistake as to the agreement between them, so far as there can be said to have been an agreement where the daughter passively acquiesced in what her mother proposed. The mistake was that of the scrivener in not correctly reducing to writing the contract which the parties intended to make. In such a case, where there has been no mistake about the agreement, but only a mistake in

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reducing the agreement to writing, such mistake, whether committed by the scrivener or by one of the parties, may be corrected, and this without showing that the mistake was mutual. Pitcher v. Hennessey, 48 N. Y. 415; Born v. Schrenkeisen, 110 id. 55. Indeed the transaction between the mother and daughter was, in effect, a gift from the former to the latter, and in such a case a mistake of the donor in giving more than she intended at the time to give is sufficient to justify a decree for reformation. Lister v. Hodgson, 4 L. R. Eq. 34; Crockett v. Crockett, 73 Ga. 647; Andrews v. Andrews, 12 Ind. 348. The defendants seek to invoke the protection of the Statute of Limitations. It is not necessary to discuss the question whether the statute, if properly pleaded, would bar the action, for it is not so pleaded. Section 388 of the Code of Civil Procedure, which is applicable to actions of this nature, reads as follows: "An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues." This defense must be pleaded in strict compliance with the terms of the statute. The manner in which the defendants undertake to plead it is as follows: "That the statutory period in which to begin such an action as is here brought, to wit, ten years, has long since expired, and that this action is consequently outlawed." The answer speaks from its date, and the allegation, therefore, is that more than ten years had elapsed at the time the answer was signed, while the provision of the Code is that more than ten years must have elapsed before the commencement of the action. There is certainly no averment that more than ten years have elapsed before the commencement of the action since the cause of action accrued. The statute is not, therefore, sufficiently pleaded. Eno v. Diefendorf, 102 N. Y. 720. The addition of the allegation that the action is "outlawed" does not help the pleading, for an allegation that a demand is outlawed is no defense unless coupled with a sufficient plea of the Statute of Limitations, and when so coupled it adds nothing to the plea. Budd v. Walker, 29 Hun, 344. The plaintiff is, therefore, entitled to a decree reforming the deed so as to conform to her intention at the time she executed it and to possession of the property. She is also entitled to damages for her eviction. These damages should consist of the rental value of

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the house since the date when the plaintiff's right was at first questioned (about September 1, 1900), with interest computed from each quarter day, less whatever the defendants or either of them may have paid for taxes, water rents, assessments, and necessary repairs to the outside of the house, with interest. If the parties cannot agree upon these items there must be a reference to compute the damages. The plaintiff is entitled to costs and an extra allowance, the amount of which can be determined upon settlement of the decree.

Judgment accordingly.

CORNELIUETT SMITH, as Temporary Administratrix of the Estate of HARLAN P. SMITH, Deceased, Plaintiff, *v.* DAVID PROSKEY, Defendant.

(Supreme Court, New York Special Term, December, 1902.)

Partnership — Effect, on the right to liquidate, of a dissolution agreement "vesting" all the assets in the liquidating partner — Replevin.

Where a written agreement, dissolving a partnership by consent and appointing one partner liquidator, further provides that all stock, book accounts, and other assets of the firm "are hereby vested in him for that purpose", he takes absolute title to them; and therefore where, before completing the liquidation, he dies intestate his administratrix takes them and the surviving partner has no right to, and cannot replevy, them.

DEMURRER to answer.

Parsons, Shepard & Ogden, for plaintiff.

James C. McEachen, for defendant.

SCOTT, J. This action comes before the court in the form of a demurrer to the answer, but it is stated in the briefs that it is not intended to raise any question of pleading, but that by agreement all the facts have been fully set up in the answer, to the

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end that a determination as to the rights of the parties may be speedily reached. The facts are simple. Harlan P. Smith, plaintiff's intestate, and David Proskey, the defendant, were partners for a number of years. On November 26, 1901, the partnership was dissolved by mutual consent and by a dissolution agreement in writing. Harlan P. Smith was thereby made liquidator, and the agreement recited that "all stock in trade, book accounts and other assets of the firm are hereby vested in him for that purpose." He was to turn the assets into cash, pay the existing obligations of the firm, including any amount found due to himself. The profits of the business were then to be ascertained and equally divided between the parties. The lease of the premises occupied by the firm was assigned to the defendant, who was authorized to carry on the business there. Soon after the dissolution Harlan P. Smith died, and the plaintiff was appointed temporary administratrix. The unsold assets were of considerable value at Smith's death, and this action, which is for replevin, is brought to test the respective claims of plaintiff and defendant to the ownership and right of possession of these assets. The plaintiff very frankly concedes the general rule that a dissolution of a partnership, when it is accompanied by an agreement merely that one of the partners shall be liquidating partner, does not *ipso facto* destroy the joint tenancy of the partners in the partnership property. From this rule follows another, which the plaintiff also concedes, namely, that inasmuch as under the circumstances stated the joint tenancy of the partners in the partnership assets still subsists, with the necessary incident of the right of survivorship, it follows that if the partner designated as the liquidating partner shall die before the liquidation is complete, the surviving partner or partners, by virtue of the still surviving joint tenancy and his or their consequent right of survivorship will become entitled to the possession of the partnership property, and charged with the duty of applying it to the liquidation of the partnership affairs. The very fact, that the joint tenancy survives the dissolution, excludes the personal representatives of the deceased partner, although during his lifetime the liquidating partner, from any right, as against the surviving partner to interfere with or administer the assets of the firm. If, then, this action presented nothing but the usual case of a voluntary dissolution and the designation

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of the now deceased partner as liquidator, there would be no question but that the defendant must prevail. The plaintiff, however, claims that the effect of the dissolution agreement in this case was to absolutely vest the title to the partnership property in her decedent, so that at his death he was the owner thereof, subject only to account to defendant for the profits derived from the business after all the debts had been paid. This claim is founded upon the language of the following sentence in the dissolution agreement: "The undersigned Harlan P. Smith is hereby made the liquidating partner of the firm, and all the stock in trade, book accounts and other assets of the firm are hereby *vested in him for that purpose.*" Of course upon the dissolution of a partnership it is competent for the partners to agree that the partnership property shall belong to one partner. In such a case, if the partner to whom the assets are given shall agree to pay the partnership debts, the partner making the transfer, though he still remains liable for those debts, loses all claim as joint tenant or otherwise to the assets themselves, and can look only to the personal security of his copartner for indemnity. Story Part., §§ 358, 359; Ketchum v. Durkee, 1 Barb. Ch. 480; Sage v. Chollar, 21 Barb. 596. If, then, the effect of the dissolution agreement was to transfer to plaintiff's intestate the title to the partnership property, the defendant has no right to its possession and judgment must go against him. In construing the dissolution agreement and thus seeking to ascertain the intent of the parties, we are to be guided by the cardinal rules of construction which require that every clause, and even every word, shall be given effect, if possible, no part being rejected unless absolutely repugnant to the general intent of the instrument, and that the words used shall be given their plain, ordinary, and popular meaning, unless the context shows that the parties used them in some other and peculiar sense. A general view of the whole instrument affords little assistance in construing the words upon which the plaintiff relies, for its general intent can be carried out equally well whether it be held that title to the assets passed to plaintiff's decedent or not. The rules of interpretation referred to forbid that we should ignore or treat as surplusage the phrase in question. It undoubtedly was used advisedly and was intended to effect some purpose. It is not a usual phrase in in-

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struments of this character, and that fact alone seems to indicate that there was a purpose in incorporating it. The word "vest" has a well-established and well-recognized meaning. In the Standard Dictionary the verb "to vest" is defined as meaning "to confer ownership of a property upon a person; invest a person with the full title to property," and in the Century Dictionary as meaning "to pass or devolve as a matter of right or title, irrespective of any immediate right of possession." The ordinary and popular, and, indeed, the legal meaning of a provision that personal property shall be "vested in" a certain person, is that the title to the property passes to and rests in him. The addition of the words "for that purpose," referring to the liquidation of the business, to the provision that the assets shall be vested in plaintiff's intestate, do not destroy or limit the meaning and effect of that provision. The assets either vested in him or they did not. If they did, they became his property, absolutely and not qualifiedly. The addition of the words "for that purpose" rather served to indicate the intention with which the title to the assets was given to him, to wit, that he should use them in the liquidation of the partnership affairs. My conclusion is that, by the dissolution agreement, plaintiff's intestate became invested with the title to and right of possession of the partnership assets; that those assets were his property and a part of his estate at the time of his death, and passed to plaintiff as his personal representative. I cannot accede to the contention urged on behalf of the defendant, that the only title which was intended to be vested in plaintiff's intestate was such title as he would have as liquidating partner and as would be necessary for him to exercise his obligation as liquidator. This construction of the agreement amounts to saying that the provision meant nothing and should be ignored, for as liquidating partner, without the aid of any such phrase, Smith would have had all the title necessary to enable him to fulfill his obligation as liquidator.

There must be judgment for the plaintiff upon the demurrer, with costs and an extra allowance of $250.

Judgment for plaintiff upon demurrer, with costs and an extra allowance of $250.

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JESSIE L. GOLDIE, Plaintiff, *v.* WILLIAM GOLDIE, Jr., Defendant.

(Supreme Court, Erie Special Term, December, 1902.)

Divorce — Admission of erroneous evidence — Does not justify the Special Term in refusing judgment.

It is erroneous upon the trial of a wife's action for a divorce for the referee to refuse to permit the defendant specifically to deny the charges of adultery proven and for the referee to exclude evidence of other witnesses of the defendant tending to refute material allegations of the plaintiff's case.

It is erroneous for the referee to admit evidence, upon the theory that it tended to show the intent with which the defendant visited a house of prostitution kept by the corespondent, tending to show that he had visited such a house kept by another woman and there committed adultery with her.

Notwithstanding these material errors, the justice, sitting at Special Term, upon an application for judgment on the referee's report in favor of the wife, granted her judgment with costs and alimony, and this because he considered that, as the erroneous rulings constituted the only reason for denying judgment and as he could not under Code C. P., § 1229, review generally the report and set it aside and grant a new trial, the wife was entitled to judgment.

APPLICATION by plaintiff for judgment of divorce upon the report of a referee.

Hammond & Diebold, for plaintiff.

Sullivan & Spaulding, for defendant.

KENEFICK, J. The referee has found that the defendant committed adultery with one Cora Allen, at a house of prostitution conducted by her, on three occasions, viz.: May 14, May 17 and May 18, 1901.

The evidence to sustain such findings was furnished by four young men who at the request of plaintiff's attorney and out of friendship for him, watched the movements of the defendant on the dates mentioned and for some time prior thereto. The de-

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fendant admitted that on each of the aforementioned dates he visited the house of the corespondent, denied that on any of said occasions he saw the corespondent and negatived, so far as he was permitted by the referee to do so, the commission of adultery with the corespondent or any other woman.

A brief rehearsal of the testimony will show that the charge of adultery was very sharply contested.

As to the first occasion the testimony for the plaintiff is that the defendant accompanied by another man was driven to the house of the corespondent and entered there about two o'clock A. M.; that a watch was maintained outside the house until one o'clock P. M., and that neither the defendant nor his companion emerged therefrom during that time; that the carriage was driven away about three o'clock A. M., but that no one was in it; that two of the witnesses entered the house about two-thirty o'clock A. M., and remained there until twelve-thirty P. M., each of them going to bed with a female inmate of the house; that neither witness saw the defendant in the house, but one of them says that about eight o'clock A. M. he saw in the corespondent's bedroom a coat and hat which he identified as the property of the defendant.

The defendant and his companion testify that they entered one of the parlors of the house, drank some wine there with some of the inmates, remained there about one hour and then left the house, re-entered their carriage and drove to their hotel. The defendant testifies that about ten-thirty A. M. he obtained money at the bank to pay his employees and he and his bookkeeper testify that at eleven-thirty A. M. he was at his place of business.

As to the second occasion, the testimony for the plaintiff is that the defendant accompanied by another man was driven to the house of the corespondent and entered there about two o'clock A. M.; that a watch was kept outside the house until five o'clock A. M., and neither the defendant nor his companion left the house during that time; that the carriage was driven away before three-thirty o'clock A. M.; that two of the witnesses entered the house about two-thirty A. M., one remaining but a short time and the other going to bed with a female inmate and remaining there until about seven o'clock A. M.; none of the witnesses saw defendant in the house that night.

The defendant and his companion testify that they entered a parlor of the house, drank there with some of the inmates, remained there about an hour, and then left the house, re-entered their car-

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riage and were driven away, the former to his hotel, the latter to his home.

As to the third occasion, the testimony for the plaintiff is that the defendant accompanied by the corespondent was driven to her house and entered there about three-thirty o'clock A. M.; that a watch was kept outside the house until about four o'clock A. M., and the defendant did not emerge therefrom; that in the interval the carriage was driven away with no one in it; that one of the witnesses entered the house shortly after the defendant went in, and remained there until one o'clock P. M.; that this witness was first shown to the Turkish room, and while there the corespondent came in; that while she was there the witness stepped out of the door of that room into the hall and saw the defendant standing in the door of the music-room; that a little later the witness accompanied a female inmate to her room on the second floor, and that while in the hall up-stairs, near her room, he saw the defendant and the corespondent standing at the door of the latter's bedroom, and then enter the room; that the witness slept with his female companion and arose about nine A. M., and going out in the hall for some purpose he saw the corespondent leave her room, clothed in a night-dress; that later in the morning the witness saw the defendant lying asleep in bed in the corespondent's room.

The defendant says that he went to the house on this occasion with two men; that they went in the Turkish room, drank there with some of the women inmates, and left in about an hour, reentered their carriage and were driven to the hotel.

One of his alleged companions on this visit is called as a witness and corroborates the defendant as to what occurred.

As to the first two visits it will be observed that, aside from the fact of his entering such a resort, there is very little to establish the commission of the adultery found by the referee.

The evidence as to what happened on the third visit presented a fair question of fact and would have justified a finding either of guilt or innocence.

It is urged by the defendant that upon the trial the referee excluded competent evidence which would have inured to his advantage in the determination of the case and that certain other evidence was improperly allowed in the case which worked to his injury.

Let us review the errors alleged to have been made by the referee.

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A witness was called by the defense whose knowledge of the interior arrangements of the house was shown and she was asked if she had observed whether one could see the door of the music-room from any place in the hall in front of the Turkish room. This question was excluded and an exception taken. Then she was asked if it was possible to see one of these points from the other, and this too was excluded under objection.

An architect who had made a plan of the house, at defendant's request, was called and substantially the same questions were put to him and excluded. This architect was also asked whether it was possible to see the entrance to the corespondent's bedroom from any point in the hall up-stairs opposite the bathroom door or opposite the rear left-hand bedroom. This was also excluded under objection.

This testimony was offered to contradict the testimony of the plaintiff's witness that on the third visit he saw the defendant at the points indicated. I cannot understand why this testimony was rejected. It bore directly on the truthfulness of the most material testimony in the case and was entirely competent.

Again, defendant was asked specifically whether he committed adultery with the corespondent or any other woman on any of these visits, and this question, put in various forms, was each time ruled out, on the ground, as stated by the referee, that it was a conclusion of law. Whether he did or did not was a fact and he should have been permitted not only to show what he did, thus raising the inference of innocence, but he also should have been allowed to deny specifically and in terms the charge of adultery. He is made a competent witness "to disprove the allegation of adultery" (Code, § 831) and I cannot conceive how he could make his denial so emphatic as by a negative answer to the question as thus framed. He had the right to have his express denial of these charges before the referee for his consideration in the decision of the case. Stevens v. Stevens, 54 Hun, 490.

His companion on the first visit was asked whether he saw the defendant have sexual intercourse with any woman on this occasion, and this question was excluded under objection.

These rulings were erroneous.

Finally, and by far the most serious error remains to be considered. Plaintiff was permitted to show that the defendant on three occasions, prior to those above specified, visited another house

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of prostitution kept by one Miss Presten, and evidence was given tending to establish that on two of these occasions he had committed adultery with Miss Presten. This evidence was received, not to sustain any of the specific acts of adultery charged in the complaint, but to prove the intent with which he visited the house of the corespondent.

This evidence was offered and received under the authority of Carpenter v. Carpenter, 30 N. Y. St. Repr. 955. That was an action for divorce where the issues were framed and sent to a jury for trial. The trial court permitted the plaintiff to show visits of the defendant to houses of ill-fame other than those in which adultery was found to have been committed and his lewd conduct therein. The General Term sustained the ruling, stating that "the evidence showed the habits and inclinations of the defendant and bears upon the probability of the evidence in support of the specific charges found to be true. In Van Epps v. Van Epps, 6 Barb. 320, evidence of the dissolute conduct and habits of the defendant was held to be corroborative of the evidence of guilt in the instance specified in the complaint."

The court seems to have overlooked two earlier decisions holding a contrary doctrine. Beadleston v. Beadleston, 20 N. Y. St. Repr. 21; Stevens v. Stevens, 54 Hun, 490.

In the Beadleston case, improper conduct with a person other than the corespondent named was permitted on the trial to show inclination on the part of the defendant to commit adultery. The Appellate Court says (p. 24): "This evidence was not proper for this purpose. For the defendant was not being tried for her general conduct or inclinations, but on specific charges. It had nc tendency to establish either of these charges or to prove the fact that adultery had been committed by the defendant with either of the other persons mentioned in the complaint. It could not be logically urged because the defendant had been familiar in this manner with Armstrong, and had accepted these demonstrations of attachment from him, that she was guilty of adultery with either of such persons."

The same class of evidence was allowed in the trial of the Stevens Case (*supra*). The General Term ruled that it was improperly received, stating (p. 493) that, "Acts of adultery not charged cannot be proved (Germond v. Germond, 6 Johns. Ch. 347). The same principle would exclude evidence of conduct leading towards

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such acts or indicating a willingness to commit such acts or in other words a lustful disposition."

The Beadleston and Stevens cases were followed by the General Term of the Superior Court of Buffalo in the case of Davis v. Davis, 4 Misc. Rep. 454, affirmed without opinion in 150 N. Y. 571.

The ruling in the Carpenter case seems to be based upon the Van Epps case (*supra*). An examination of the Van Epps case shows that no such principle was enunciated there and a casual statement at the close of the opinion is seized upon to sustain the admission of such testimony. I feel justified, therefore, in rejecting the authority of the Carpenter case and in following the other cases cited.

The furthest that the cases go, aside from the Carpenter case, is to hold that improper familiarities and acts of adultery, other than those charged in the complaint, *committed with the participes criminis named in the complaint* may be proved to show adulterous intent on the part of the defendant toward such *participes criminis*. Lockyer v. Lockyer, 1 Edm. Cas. 107; Anon., 3 Abb. N. C. 161; Smith v. Smith, 37 N. Y. St. Repr. 267; Thayer v. Thayer, 101 Mass. 111.

Can it be said that this objectionable evidence did not influence the decision arrived at?

In the Beadleston, Stevens and Davis cases (*supra*) the admission of such testimony caused a reversal of the judgment of the trial courts.

Here we have such improper evidence operating upon the mind of the referee, and also we have highly material evidence excluded from his consideration.

I am of the opinion that these rulings are erroneous; that they indicate that a fair trial was not had and afford a reasonable doubt as to the justice of the result and upon appeal will constitute reversible error.

The question presented here is whether this court is authorized to deny judgment because of substantial errors committed by the referee in the reception and exclusion of evidence.

The section of the Code of Civil Procedure under which this application is made (1229) provides: "In an action to annul a marriage, or for a divorce or separation, judgment cannot be taken, of course, upon a referee's report, * * * Where a refer-

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ence is made in such an action, the testimony, and other proceedings upon the reference, must be certified to the court, by the referee, with his report; and judgment must be rendered by the court." The power of the court under this section is not yet clearly settled. Many of the earlier cases held that this power was conferred upon the court merely as a safeguard against fraud or collusion or failure to comply with the various statutory requirements as to the conduct of actions for divorce. Uhlmann v. Uhlmann, 17 Abb. N. C. 236; Schroeter v. Schroeter, 23 Hun, 230; Anon., 3 Abb. N. C. 161; Rice v. Rice, 22 Wkly. Dig. 258. And that the court was not authorized to examine the case upon the merits, or review the rulings upon the trial. Ross v. Ross, 31 Hun, 140; Ryerson v. Ryerson, 55 id. 191.

Some of the cases went further and held that the court was empowered to refuse judgment where the proof was insufficient to sustain the referee's findings. Blott v. Rider, 47 How. Pr. 90; McCleary v. McCleary, 30 Hun, 154; Harding v. Harding, 43 N. Y. Super. Ct. 27; Matthews v. Matthews, 53 Hun, 244.

The recent cases sustain the view that the court has power to deny judgment if the evidence and proceedings certified by the referee do not support his findings satisfactorily to the conscience of the court. Gorham v. Gorham, 40 App. Div. 564; Goldner v. Goldner, 49 id. 395.

In the case of Moore v. Moore, 14 Wkly. Dig. 255, an appeal was taken to the General Term, First Department, from an order denying a judgment of divorce upon the report of a referee. The defendant did not appear in the action. Upon the hearing the plaintiff was allowed to testify to certain facts tending to establish defendant's adultery, contrary to the provisions of section 831 of the Code. For this error the Special Term denied the application for judgment. The General Term affirmed the order. Justice Daniels, writing the opinion, says (p. 256): "As this improper evidence was obtained from her, and the referee made his report upon the whole case, it must have entered into his conclusion, and for that reason the report itself was vitiated, and that justified the refusal to confirm it." That case is certainly authority for the proposition that the violation of any statutory rule of evidence upon the trial is sufficient warrant for denying a judgment of divorce.

There is no reported case, so far as I have discovered, which

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holds that this court has the power generally to review the rulings made upon the trial; although there are remarks in the opinions in Reynolds v. Reynolds, 33 App. Div. 625, and Smith v. Smith, 7 Misc. Rep. 305, which convey the inference that such power resides in this court.

Having regard for the reason upon which this provision of the Code is based, viz.: "to prevent a judgment from being entered which would justify the consummation of a new marriage by the successful party, and the complications arising from the existence of a judgment which might be plainly erroneous" (RUSSELL, J., in Smith case, *supra,* p. 307) it would seem as though this court should have the plenitude of power to review possessed by the Appellate Court.

I should not hesitate to so hold if this court could order a new trial.

The authorities, however, are almost unanimous in holding that this court on this application can only grant or refuse the judgment applied for, and cannot set aside the referee's report and order a new trial. Ross, Ryerson, Gorham and Goldner cases, *supra; contra,* Harding case, *supra.* What relief, if any, either party can obtain from the Special Term, after a denial of judgment is not pointed out in any of these cases, and that subject is dismissed in one of the recent cases with this remark, viz.: "What the further practice of either party, if aggrieved, may be we cannot decide until the question is presented to us." Gorham case, *supra,* 567.

Until it is clear that the Special Term may order a new trial of the issues, I am unwilling to extend the power of this court under section 1229 to a review of the rulings of the referee in the admission and exclusion of evidence.

If the Appellate Court reverses the judgment for the errors herein referred to it has the power to grant the plaintiff the benefit of a new trial.

As no other reason exists for denying this application, judgment of divorce is granted, with costs and alimony.

Judgment of divorce granted, with costs and alimony.

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WELCOME FAVILLE, Plaintiff, *v.* MARTHA HADCOCK and MORGAN L. HADCOCK, Defendants.

(Supreme Court, Fulton Special Term, December, 1902.)

Equity — Jurisdiction — Complaint for special relief on the foreclosure of a mechanic's lien — Costs not regulated by Code C. P., § 3228, subd. 4.

A complaint, setting forth a mechanic's lien against certain real property in which the defendant Morgan L. Hadcock is described as owner, alleging that such was the ownership so far as known to the plaintiff when he filed his lien, that in fact the defendant Martha Hadcock was the owner when the work was done and the lien filed, and asking that it be adjudged an incumbrance on her interest in the property, that the lien be foreclosed, her interest sold, and the money brought into court for distribution, states a cause of action in equity and one cognizable only there, as special relief against the defective notice of lien is sought.

Therefore the provisions of Code C. P., § 3228, subd. 4, do not apply to the action or limit the costs.

MOTION to set aside judgment by default, to permit defendants to come in and defend and to strike from the judgment plaintiff's costs and direct costs in favor of defendants.

Horton D. Wright, for motion.

Frank Talbot, opposed.

SPENCER, J. The action is to foreclose a mechanic's lien. The summons and complaint were served personally on both defendants and they have purposely made default. Judgment being taken against them with costs, they now, without presenting any excuse for not appearing at the proper time, ask to be permitted to come in and off-set against the plaintiff's demand, a small claim for damages because of the unworkmanlike manner in which plaintiff's services were performed. All the facts pertaining to such off-set were fully known to them at the time the summons and complaint

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were served, and to allow them now to make such defense would not be in furtherance of justice. Furthermore, it could only be upon terms involving an expense to them more than double the amount of the damages of which, by their proposed answer, they would be entitled to give proof. Under these circumstances, it is difficult to perceive how they are to be benefited by being permitted to litigate the issue which they tender. The application to set aside the judgment and let defendants in to defend is, therefore, denied.

The question as to costs is not so clear. Chapter 419 of the Laws of 1897 (supplemental to the Code of Civil Procedure and constituting sections 3398 to 3419 thereof) prescribes proceedings for the enforcement of mechanics' liens on real property. It provides that a lien may be enforced against the property and against a person liable for the debt by an action in a court which has jurisdiction in an action founded on a contract for a sum of money equivalent to the amount of the debt. Code Civ. Pro., § 3399. This, beyond question, authorizes an action in justice's court, where the amount of the debt upon which the lien is founded does not exceed $200. But there is nothing to prevent such action being brought in this court however small the debt, and any attempt to limit such jurisdiction would be invalid. People ex rel. Mayor v. Nichols, 79 N. Y. 582. But the Legislature has the power to accomplish practically such a limitation, and it has so done in certain actions by refusing costs to a plaintiff where his complaint demands judgment for a sum of money only, and he recovers less than $50, and by granting costs in such case to the defendant. Code Civ. Pro., § 3228, subd. 4; § 3229. But do these sections apply here? A provision in the supplemental chapter above referred to seems to indicate otherwise. It provides as follows: "If an action is brought to enforce a mechanic's lien against real property in a court of record, the costs and disbursements shall rest in the discretion of the court, and may be awarded to the prevailing party. If such action is brought in a court not of record, they shall be the same as allowed in civil actions in such court." Code, § 3411.

The statute of which the section quoted forms a part provides two distinct remedies, one for the foreclosure of a lien in an action in equity in courts of record, and one for debt in an action at law upon the agreement set forth in the notice of lien in courts not of record. The latter form of action may, no doubt, be brought in

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this court because of its general jurisdiction, and where this is done and the complaint demands judgment for a sum of money only, as in an action at law, there is no doubt that the provisions of sections 3228 and 3229 should apply and regulate the award of costs. It also seems that under the provisions of the statute referred to, the lienor is at liberty to bring his foreclosure action in this court, however small his claim, without subjecting himself to the provisions of sections 3228 and 3229 in respect to costs. Such an action is a suit in equity. Kenney v. Apgar, 93 N. Y. 539; Schillinger Cement Co. v. Arnott, 152 id. 584.

But that question need not be determined here, as the action is not for debt upon the agreement set forth in the lien, nor is it solely for a foreclosure of such lien, nor does the complaint demand judgment for a sum of money only. On the contrary, the complaint sets forth a mechanic's lien against certain specified real property in which the defendant Morgan L. Hadcock is described as owner, and alleges in substance that such was the ownership of the real property, so far as the same was known to the plaintiff at the time he filed his notice of lien; that in truth and fact the defendant Martha Hadcock was the owner of said property at the time the work thereon was performed and the notice of lien filed, and asks to have said lien adjudged an incumbrance upon her interest therein, and that such lien be foreclosed, her interest sold, and the money brought into court for distribution, etc. The complaint thus goes beyond a simple suit of foreclosure and seeks special relief in regard to the defective notice. The plaintiff, on account of such defective notice, was not at liberty to enforce his lien in an action for debt in justice's court. He was, therefore, compelled to bring his action in equity, and justices' courts have no jurisdiction of equitable actions. In Coon v. Brook, 21 Barb. 546, this court said: "The respondent's counsel insists that the authority conferred on justices of the peace, to try and determine actions, according to law and equity, gives them jurisdiction to try equitable actions. This position is erroneous. Although courts of justices of the peace have some of the powers which are possessed by courts of record, no decision can be found holding that such courts can try purely equitable actions of any kind."

This decision was rendered in 1856 and to the present time I find no decision to the contrary. Neither is there anything in chapter 419, Laws of 1897, to which reference has been made, to

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indicate any attempt to confer such jurisdiction in lien cases. The act makes a clear distinction between actions brought in courts of record and those brought in courts not of record. In the former court all the parties in interest, including not only those having incumbrances by way of mechanics' liens, but by judgment, mortgage or otherwise, are required to be made parties. The court must adjust and determine the equities of all the parties and also the order of priority of the different liens. In short, the form of the action, the enforcement of the judgment by foreclosing the rights of the parties, the awarding of a deficiency judgment against persons liable for the debt, and all the proceedings, are in all respects the same as in the foreclosure of a mortgage in courts of equity.

But in courts not of record no such proceedings are had. The action proceeds as a personal one upon the agreement set forth in the notice of lien; there is no provision for the adjustment of equities among other lienors and incumbrancers, if any should exist, and the judgment is enforced by execution in the same manner and subject to the same limitations and restrictions as judgments in actions at law, except that the sale is of the interest of the owner at the time of the filing of the lien and not from the entry of the judgment. Strictly speaking, it is an action at law, and in no sense an action in equity. The remedy afforded to the lienor falls far short of that available to him in an action in courts of record. I am, therefore, of the opinion that the provisions of section 3228, subdivision 4, of the Code, in respect to costs, do not apply.

These views lead to a denial of the defendants' application, but as the amount involved is small and some of the questions involved are of a novel character, costs of the motion will not be allowed.

Motion denied, without costs.

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JAMES H. CRUIKSHANK, Plaintiff, *v.* EDWIN A. CRUIKSHANK et al., Defendants.

(Supreme Court, Kings Special Term, December, 1902.)

Will — A bequest revoked by implication — Meaning of "amend" and "instead of" — Vesting of a remainder.

The fourth item of the holographic will of a layman, who left a daughter Hattie, who has since died leaving a son, the plaintiff in this action for a construction of the will and now of age, created for her in his executors a life trust and further provided that after her death the income should be used for the support, etc., of her surviving issue, if any, during minority, the principal to be thereupon paid the issue, but that, if no issue survived or if the issue died before "maturity", the principal should go equally to the testator's "remaining children". He made a second codicil as follows: "Under section four of said will I have given to the issue of my daughter Hattie at her death the entire principal real and personal of the fund held by my executors in trust for her use and benefit during her life: This bequest I hereby amend by giving to said issue the income of said fund instead of the principal and, with this end in view, I hereby give to my executors full power and authority to act as trustees of said issue and in like manner and respect as in the case of Hattie during her lifetime".

Held, that the plaintiff took only a life interest in the *corpus*.

That the "remaining children" took the remainder, that it vested in them upon the testator's death, and that vesting was not affected by a power given the executors to sell any property held in trust for his daughters (there were two) upon their consent, with directions to the executors to reinvest the proceeds.

ACTION for the construction of a will.

Russell E. Burke and William Harison, for plaintiff.

Edward De Witt, for the defendant trustees.

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J. Bradley Tanner, for defendants Warren Cruikshank, Edwin A. Cruikshank, and Carrie C. Timpson.

William H. Harris, guardian *ad litem* for infant defendant.

MADDOX, J. The will and codicils under consideration, holographic in character, were prepared with evident care and the will alone by itself comprehensively presents a complete scheme, is readily and without difficulty construed and interpreted and testator's plan and purpose made plain; it is with the second codicil that question is raised, and that of a serious nature, since it involves the possible disinheriting of a grandchild, save as to the income, during his life, of a trust fund of about $50,000.

Testator's intention must be gathered, if possible, after a careful scrutiny and consideration of all the language employed in the will and the three codicils as one instrument and his purpose, when ascertained, effectuated and not frustrated because of any inapt or incomplete expression or by reason of an inadvertent omission in a provision or item thereof, and the language of a holographic will should be given its ordinary and popular significance and meaning, rather than a technical interpretation, especially if the testator be a layman.

The controversy here is as to the final disposition of the *corpus* of the trust created for the benefit of the daughter Hattie and her issue, by the fourth item of testator's will, as the provisions thereof are affected and changed by the second and third sentences of his second codicil.

By said fourth item the testator gave and devised certain property to his "executors, in trust, for the benefit of my daughter Hattie during life, * * * and all moneys derived thereby from rents, dividends, interest and from all other sources are to be paid over in quarterly payments to my said daughter Hattie after all taxes, insurances, repairs and other proper charges including a commission of five per cent. on sums collected as income for their services have been deducted and paid. On the death of my said daughter Hattie leaving issue her surviving the income derived from this trust, or so much of it as my executors may deem proper, is to be used for the support, education and maintenance of such issue during minority and when that is reached the entire principal is to be paid over to such issue; and in case there be no issue

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her surviving or the issue die before maturity, then, in either event, the said principal is to go to my remaining children share and share alike".

A trust provision similar in every respect to the foregoing was made in favor of testator's other daughter, Carrie, and her issue, which was not changed by any of the codicils, and the bequests and devises to the three sons are alike in tenor and absolute in terms.

By the second codicil testator, among other things, provided as follows: "Under section four of said will I have given to the issue of my daughter Hattie at her death the entire principal real and personal of the fund held by my executors in trust for her use and benefit during her life: This bequest I hereby amend by giving to said issue the income of said fund instead of the principal and, with this end in view, I hereby give to my executors full power and authority to act as trustees of said issue and in like manner and respect as in the case of Hattie during her lifetime."

It is plaintiff's contention that the gift of the principal of that trust to Hattie's issue was not revoked by the second codicil and that he, as the sole issue, has a vested remainder therein, subject to an equitable life estate; that the control and enjoyment only of the principal is postponed and instead thereof that he takes the income for life. That, being beneficially interested in the whole of the income thereof and being entitled to the remainder of the whole of the principal of said trust, subject only to such beneficial estate for his life, and having released to himself as such remainderman his beneficial interest in the income, by operation of law, a merger of the trust in the remainder has resulted and that he is, therefore, entitled to the immediate possession and control of the same. 1 Rev. Stat. 730, § 63, as amd. by Laws of 1893, chap. 452; Real Prop. Law, Laws of 1896, chap. 547, § 83; Pers. Prop. Law, Laws of 1897, chap. 417, § 3. On the other hand, the defendants claim a revocation of the bequest of the remainder and contend that it went to and vested in the testator's "remaining children share and share alike."

At the outset it is well to be mindful that the law favors equality as between the children and grandchildren of a testator and that courts will avoid disinheritance of one entitled to a testator's bounty, unless the intention to discriminate or to exclude is clearly shown; likewise, that a partial intestacy is not to be favored if by

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fair interpretation of the language used it can be avoided; again, that a gift or devise couched in clear and unmistakable language will not be cut down or be deemed revoked by a subsequent provision or clause not equally as clear and as decisive in terms, and further, that equality as between his children and their issue, save as limited by the provisions of the second codicil as to the gift to her issue of the principal of the trust created for the benefit of his daughter Hattie, is well evidenced by testator's language, as is also his intention to fully dispose of all his estate, for he has seemingly negatived the possibility of a partial intestacy in any event.

The daughter Hattie had been divorced in 1880 and, having resumed her maiden name, with her only child, this plaintiff, then about three years old, went to live in testator's home, he having retired from business; the family then consisted of the testator, his two daughters, Miss Riddell, a friend, and this plaintiff, and it so continued until testator's death in 1895, the relations, so far as appears, continuing amicable and of an affectionate character. The daughter Hattie did not remarry, was about thirty-eight years of age when the will was executed, having, with her child, then lived as a part of testator's household about twelve years; she died in October, 1896, and it is to be presumed that the testator knew of his daughter Hattie's domestic infelicities and her situation in life with one child, her only issue.

Now, the construction and effect of the provisions of the fourth item of the will, uninfluenced by any subsequent clause, should be first considered. It must be conceded that a valid trust was thereby created, with a life estate in the daughter and a remainder over to her issue; the net income was to be paid to her quarterly and on her death leaving issue the income was to be applied, as the executors deemed proper, "for the support, education and maintenance of such issue during minority and when that is reached the entire principal is to be paid over to such issue." When what is reached, may well be asked and the answer is, I think, to be found in the language immediately following, where testator provided that "in case there be no issue her surviving or the issue die before maturity, then, in either event, the said principal is to go to my remaining children share and share alike." Thus we have the word minority used in limitation of the term during which the income shall be applied to the "support, educa-

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tion and maintenance of such issue," and then, when majority is reached, when minority is passed, such application of the net income shall cease; if the issue shall die before *maturity,* an inapt expression indeed, but this is the holographic will of a layman, the principal is to go to testator's remaining children, otherwise to "such issue." The payment over of the principal is deferred until the time limited for the "support, education, and maintenance of" the issue shall have lapsed and hence the word *maturity* as used here must be held to mean *maturity in law,* or when such issue shall have reached majority. Again, testator contemplated the other possible contingency, namely, the default of issue on the part of his daughter, and in that event gave the principal, the remainder, to his "remaining children" so that if for any reason such issue did not take then it would go to his remaining children upon the termination of the trust.

The testator thereby intended, *first,* to provide for the support of the daughter Hattie for her life and, *secondly,* the "support, education and maintenance" during minority of her issue, thus providing for an intermediate life estate and a minority before distribution. The trust term was measured by the life of the daughter and the principal thereof made payable upon her death to her issue if majority had then been reached, but if the issue died during minority, and likewise in case of default of issue, then to his remaining children.

And now we reach the more serious question, the meaning of the codicil provision and its effect upon the gift over of the principal by the fourth item of the will; close scrutiny and careful consideration must, as before stated, be given to the language of the will and of the several codicils as one complete instrument and the testator's intention and purpose ascertained therefrom. Ward v. Ward, 105 N. Y. 68.

As shown by the second codicil, after referring to the gift "to the issue of my daughter Hattie at her death" of the entire principal of the trust for her benefit, testator said: "This bequest I hereby amend by giving to said issue the income of said fund instead of the principal and, with this end in view, I hereby give to my executors full power and authority to act as the trustees of said issue and in like manner and respect as in the case of Hattie during her lifetime" and, hence, did he mean by the use of the

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words "amend" and "instead of," to revoke the previous gift of the principal to such issue?

By the tenth item of his will he gave to his "children an equal undivided interest in" his residence, and by the third paragraph of the first codicil he directed that such gift "is hereby amended by" giving to the two daughters "the income to be derived thereby instead" and, also, that the "executors place said proceeds of the sale to the fund, as an integral part thereof, held by them in trust for the use of my said daughters respectively during life."

How nearly alike the two codicil provisions last quoted are. In both he used the words "income" and "instead," and in one the word "amend," while in the other "amended." Can it be urged that in the last codicil paragraph referred to he did not revoke the gift to the two daughters of "an equal undivided interest in" his residence? I think not. But, to continue, it may be fruitful in thus seeking his intention particularly to call attention to other language in the codicils, viz.: In the first, after referring to the bequest of $5,000 to Miss Riddell, he said: "This bequest is hereby annulled and in its stead I give and bequeath the said sum" in trust, during her life; again, "I hereby annul the bequest" to the children of his brother Edward and instead thereof I give to each" $200; in the second codicil, referring to the gift to Georgianna Dyckman, he said "this bequest is hereby revoked and in its stead I give to her * * * one hundred dollars," and in the third, in each of the first three paragraphs, his language is "I hereby revoke and declare void" several bequests, and continuing he said in each, "and instead thereof I give and bequeath" other sums to the same beneficiaries. Thus we have the words "annulled," "annul," and "amended" used in the first codicil; the words "amend" and "revoked" in the second and the expression "revoke and declare void" in the third, while in all of the provisions in which they are found we likewise find the use of the words "instead" or "in its stead," and, hence, the use of the words "instead" and "in its stead," in each of the instances above quoted, as well as in the paragraph under consideration, must be deemed indicative of some intention on the part of the testator in thus substituting in each one gift for another, since the ordinary and popular definition of the word "instead" and the phrase "in its stead" is in the room of, in lieu of, in the place of; they are expressions of substitution of one thing for another, of equiva-

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lence, and we find that in Southport Plank Road Co. v. Russell, 7 N. Y. St. Repr. 597, an action involving statutory construction, the court, Judge Follett writing, held that "The term, '*instead of*,' means in the place or room of; and the plain intent * * * was to supersede;" that the language used resulted in a statutory repeal by implication.

Therefore, in using the words and term referred to, the testator indicated most clearly an intention to change each of the provisions annulled, amended or revoked, and to supersede the substance of the gift in each case by the substitution of something different and consequently the bequest of the principal of such trust to the issue of Hattie was by implication revoked, for if such issue were to have both there would be an inconsistency, since then there would be no substitution of the one for the other and the use of the term *instead of* would in that case be meaningless. In reaching this conclusion I am not unmindful of the language of the bequest to plaintiff, of the $300 by the fifth item of the third codicil and the solicitude therein expressed by the testator for plaintiff's future.

By the eleventh paragraph of the will "full power and authority" was given to the executors "to sell and dispose of * * * the whole or any portion of the real or personal estate held by them in trust for" the daughters upon their consenting, with directions to reinvest the proceeds in bonds and mortgages.

And now, the will and codicil speaking as one instrument, and as of the time of testator's death, we have a full and complete scheme and purpose on the part of the testator as to all of his property and it is to be noted that those who were to take on the termination of the trust in question were then in being and were known; they were his remaining children and thus no partial intestacy could result. The bequest was complete, but the control, possession and enjoyment of the *corpus* of the trust was postponed until the termination of the trust, out of which were carved two intermediate life estates, that of the daughter Hattie and the other of her issue, this plaintiff.

Reading the fourth item of the will as so modified and changed by the codicil provision in question, there is nothing indicating an intention that the vesting should be postponed and futurity was not annexed to and was not of the essence of the gift of the principal over; therefore, testator's "remaining children" took upon his death a vested remainder in fee in the *corpus* of such trust.

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Roosa v. Harrington, 171 N. Y. 349. The power of sale did not effect the vesting of the estate in the remaindermen; they took their interests subject to the life estates and the exercise of that power of sale had already vested in his remaining children. "When the will went into effect by the testator's death, there was no contingency; either as to the person entitled in remainder, or as to the event by which the intermediate estate was to be determined." Van Axte v. Fisher, 117 N. Y. 403.

It is unnecessary to consider the effect of the release executed by plaintiff and for the reasons above stated judgment is directed for defendants.

Judgment for defendants.

THOMAS LEGGETT, as Assignee, Etc., Plaintiff, *v.* HARRY T. W. WALLER, Defendant.

(Supreme Court, New York Special Term, December, 1902.)

Supplementary proceedings — A seat in an exchange may be reached even if incumbered by preferred debts to other members — Exemption as "working tools". Code C. P., § 1391 — Form of an order appointing a receiver in such case.

A seat in the Consolidated Stock and Petroleum Exchange of New York is property which will pass to a receiver, of the property of the member, appointed in supplementary proceedings.

If the seat is incumbered by preferred debts to other members of the exchange the equity in the seat will pass to the receiver.

Semble, that the seat is not exempt under Code C. P., § 1391 as "working tools" of the member, and, in any event, if worth more than $250, cannot be exempt as to the excess above that sum.

Form of an order appointing a receiver where there are preferred creditors of the exchange, and the receiver must act to some extent under its rules.

APPLICATION by a judgment creditor for the appointment of a receiver of the property of his judgment debtor.

Samuel I. Ferguson, for judgment creditor.

McCurdy & Yard (Delos McCurdy, of counsel), for judgment debtor.

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FITZGERALD, J. This is an application by a judgment creditor for the appointment of a receiver of the property of his judgment debtor as disclosed by the examination of the latter in supplementary proceedings. The property in question consists of a seat in the Consolidated Exchange, of the estimated value of $2,000, but against which the debtor testifies there are debts, for money loaned, now outstanding. The application is opposed upon the three grounds: that the examination discloses no property to which the receivership could attach; that the seat and its attendant privileges constitute the defendant's necessary working tools and, as such, are exempt from judgment creditors, and finally, that the cases in which such applications have been granted concerned only the New York Stock Exchange, the rules of which are different from those of the Consolidated Exchange. So far as the judgment creditor's right to the receivership is concerned the first objection is of no force. The examination does disclose that the debtor owns a seat in the Consolidated Exchange of the estimated value of $2,000. It is true that the examination states that against this seat there are claims of other members; and these claims, under the rules of the association, have preference over and are to be paid before all other claims. The debtor does not show, however, the nature or extent of these claims or disclose the probability that the amount thereof is sufficient to exhaust the fund that might be created by a disposition of the seat; and it may be that he has a substantial equity therein, to which the receiver would be entitled. Where there are conflicting claims against the debtor's property, the court cannot try and determine them, but should appoint a receiver (Teller v. Randall, 40 Barb. 242; Corning v. Tooker, 5 How. Pr. 16), who will receive such title to the property as was in the judgment debtor and subject to the conditions and restrictions by which it was surrounded in the latter's hands. The alleged existence of the other indefinite claims should not prevent the receivership, though it may subsequently cause that receivership to be of no practical benefit, so far as a realization of assets is concerned. The second objection is made upon the authority of Keiher v. Shipherd, 4 Civ. Pro. 274, where it was held that the share in the New York Law Institute of the value of $150, held by the judgment debtor, a lawyer in active practice, and the privilege it confers, constituted his necessary working tools and library as a member of the legal profession, and as such was ex-

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empt from judgment creditors. That case is not identical with the one now before the court, for, though the constitution of the law institute and the nature and extent of the privilege of membership therein were not in that case and are not now fully set forth before the court, for the purpose of comparison, it may be said that the share and its attendant privileges are commonly supposed to consist of the right to make use of the books and facilities supplied by the institute. These books and similar facilities constitute the working tools of the lawyer. It is financially and physically impossible for the ordinary practitioner to own and keep all or most of the books in which the law is recorded or expounded, but he may obtain access to and the use of them by securing membership in an association which does possess them, and when he does, that membership constitutes, in law, his books or library or working tools. Such is the full extent and significance of the decision referred to, as is evident from the authority upon which it is based, viz., Robinson's case, 3 Abb. Pr. 466, where it is held that the professional books necessary to a professional man who supports his family, for the practice of his profession, are exempt from execution as a part of his family library. The membership in such an institute, with its privileges as above stated and as commonly understood, is essentially different, in legal nature, from the valuable right, license or franchise to transact business, in a special board or exchange, with a limited membership, and with peculiar rights and suitable facilities for the conduct of such business. Again, even assuming that the seat in question constituted the judgment debtor's working tools, it would, under section 1391 of the Code, be exempt only to a sum not exceeding $250 (Faxon v. Mason, 76 Hun, 408); whereas the debtor's own testimony shows it to be now worth about $2,000. The third objection of the debtor seems to concede that so far as seats in the New York Stock and Cotton Exchanges are concerned, they are subject to the claims of outside, including judgment, creditors, and receiverships thereof may be ordered; but it further asserts that by reason of the different rules of the Consolidated Exchange, a seat in the latter is not subject to such claims or receivership. The differences between the rules of the said exchanges, and consequently the differences between seats or memberships therein and the effect of these differences upon the merits of this application, are not presented to the court. It has been held that a membership in the

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New York Cotton Exchange is property which passes to a receiver, who may maintain an action to compel the debtor to convey his seat to the member or to a member-elect with whom the receiver may negotiate for its sale. Ritterband v. Baggett, 4 Abb. N. C. 67; Powell v. Waldron, 89 N. Y. 328. The Court of Appeals, in People ex rel. Lemmon v. Feitner, 167 N. Y. 1, indicates, at page 6, a difference between the rules and regulations of the Stock Exchange and those of the Cotton Exchange. But an examination of these portions of the judicial authorities which quote the provisions of the constitution and by-laws of the Stock Exchange indicates that, so far as the nature of the membership and the merits of this application are concerned, they are very similar to and in many respects identical with those of the Consolidated Exchange, which are here referred to in opposition to this motion. And a membership in the former exchange has frequently been judicially declared to be property which passes to assignees in bankruptcy, is subject to the claim of creditors, and of which a receiver may be appointed. Matter of Ketchum, 1 Fed. Repr. 840; Hyde v. Woods, 4 Otto (U. S.) 523, referring to membership in the San Francisco Stock and Exchange Board; Grocers' Bank v. Murphy, 60 How. Pr. 426; Belton v. Hatch, 109 N. Y. 593; People ex rel. Lemmon v. Feitner, 167 N. Y. 1, 7. As a final answer to the last objection of the judgment debtor, we have in the case of Roome v. Swan, 15 Civ. Pro. 344, an instance not only of the appointment of a receiver of a seat or membership in the very exchange of which the judgment debtor herein is a member, viz., the Consolidated Stock and Petroleum Exchange of New York, but also a statement of the subsequent procedure to make that receivership effectual. For the above reasons, the motion for the appointment of a receiver should be and is hereby granted. As the right, title and interest of the receiver is probably subordinate to the rights of the creditors of the judgment debtor who are his fellow members in the exchange, and as the receiver's jurisdiction over the seat or membership must be subject to and exercised in accordance with the rules and regulations of that exchange, the order to be presented should incorporate the practice suggested in Grocers' Bank v. Murphy, 60 How. Pr. 426, and Roome v. Swan, 15 Civ. Pro. 344. Settle order on notice.

Ordered accordingly

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BERTHA TOBIN, Plaintiff, *v.* FREDERICK H. GRAF and CHARLES FREDERICK GRUNINGER, as Trustees, Etc., of CATHARINE KIEFER, Deceased, MARY C. KIEFER and HENRY S. KIEFER, Defendants.

(Supreme Court, New York Special Term, December, 1902.)

Active trust in personalty — Separable void provision for accumulation — Person presumptively entitled to the next eventual estate — Accumulation of an infant's income after majority.

A devise of an estate, wholly personal, to the testator's adult daughter if her husband dies before him but, otherwise, to trustees for her with directions to them to accumulate the profits until, and transfer and convey the estate, etc., to her upon, her husband's death, and if she dies before him the property to pass to a grandson, creates, living the husband, a valid active trust, not invalidated by the separable void direction for an accumulation not for the benefit of and during the minority of an infant or infants.

Profits accumulated thereunder will belong to her, under L. 1896, chap. 547, § 53, and 1897, chap. 417, § 2, because she is the person presumptively entitled to the next eventual estate, since the trust was made primarily for her benefit.

A direction to accumulate the income on a legacy to an infant until he reaches the age of twenty-five years is valid until, and void after, majority, and therefore he will be entitled to the income after majority and until he becomes twenty-five, and thereupon to the principal as it was when he became twenty-one.

ACTION for the construction of a will.

George P. Breckenridge for plaintiff.

Hugo H. Ritterbusch for defendant trustees.

Henry Fried for defendant Mary C. Kiefer.

Leon Lewin, guardian ad litem for infant defendant Henry S. Kiefer.

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STECKLER, J. The will of Catharine Kiefer, deceased, for a construction of which the action is brought, contains the following provisions: "All the rest, residue and remainder of my estate of whatsoever kind and wheresoever situate, I give, devise and bequeath unto my daughter, Bertha Tobin, forever, providing that her husband, John T. Tobin, shall have predeceased me; but if the said John T. Tobin survive me, then, and in that event, all the rest, residue and remainder of my estate I give, devise and bequeath unto Frank H. Graf and Charles Frederick Gruninger or survivor of them in trust for my daughter, Bertha Tobin, until the death of her husband, John T. Tobin, at which time they are directed to transfer and convey unto her the whole of said estate, with accumulated profits, forever. If my daughter, Bertha Tobin, shall predecease me or predecease her husband, then, and in that event, I give, devise and bequeath all the rest, residue and remainder of my estate unto my grandson, Henry S. Kiefer, the child of my son Henry, forever. The trustees, in whom I have full confidence, have full power to manage, sell or invest my estate as they in their sound judgment see fit. I further direct the rents, issues and profits be accumulated as capital."

Bertha Tobin, the daughter of the testatrix, survived her mother, and Bertha's husband, John T. Tobin, is living. It was evidently the intention of the testatrix that Bertha Tobin should receive neither the principal nor interest of the residuary fund until the death of her husband.

The direction for the accumulation of income on the gift in trust for the benefit of Bertha Tobin not being for the benefit and during the minority of an infant is unlawful (Real Property Law, sec. 51; Personal Property Law, sec. 4; Pray v. Hegeman, 92 N. Y., 508). So that if the residuary estate was realty the trust would be void; for it is not one of those authorized by the Real Property Law (sec. 76), a trust in real estate being invalid unless brought within the terms of the statute (Hagerty v. Hagerty, 9 Hun, 175). But the residuary estate consisted solely of personalty, and trusts of personal property are not in respect either of the mode or purposes of their creation within the Statute of Uses and Trusts (Matter of Carpenter, 131 N. Y., 86; Hagerty v. Hagerty, *supra*), and may be created for any purpose not *per se* illegal (Gilman v. Reddington, 24 N. Y., 9). It is true that in Maitland v. Baldwin (70 Hun, at p. 270) the contrary doctrine

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seems to be stated, but that statement is mere *dictum,* for it was not necessary in the disposition of the case.

A void direction for accumulation does not invalidate the gift or bequest of the principal, which, if valid, may stand without the accumulation (Williams v. Williams, 8 N. Y., 538; Kilpatrick v. Johnson, 15 id., 322; Barbour v. De Forest, 95 id., 13; Hascall v. King, 162 id., 134). It seems to me, therefore, that if apart from the direction for accumulation a valid trust was created by the testatrix it is the duty of the court, to prevent intestacy, to leave that trust intact so as to preserve the general plan of the testatrix (Kalish v. Kalish, 166 N. Y., 368).

Apart from the accumulation the trust had a legal purpose, for it was plainly the design of the testatrix that Bertha should receive the residuary estate; that the executors should hold the property until the death of John T. Tobin and then transfer it to Bertha, if living; and the direction to the trustees, on the death of John T. Tobin, to transfer and convey the property to Bertha (although even if the corpus was realty the statute would doubtless operate to execute the use in the beneficiary in case of the failure of the trustees to convey) makes the trust an active one (Townshend v. Frommer, 125 N. Y., 446; and see Holly v. Hirsch, 135 id., 590; Reynolds v. Denslow, 80 Hun, 359).

The trust having been created for a proper purpose, and the power of alienation not having been unduly suspended, it follows that the trust is valid.

The situation is similar to that presented in Hascall v. King (162 N. Y., 134), where the court said (p. 152): "But it does not follow that the entire trust should be held to be void because of the direction to unlawfully accumulate a part of the income. The rule is that where there are two trust objects, one of which is principal and the other alternative, and the latter only is void, the principal trust may stand and the other fall. That rule is applicable to this situation and should govern it. The primary object of this testator, by the creation of this trust, was to provide an income for his wife, the accumulation for the purpose of paying mortgages being secondary." So in this case the primary object of the testatrix was that her daughter Bertha should receive on the death of John T. Tobin the residuary estate, the disposition of the income from the fund being of secondary importance in the design of the testatrix.

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The question as to the disposition of the income from the residuary fund, the accumulation of which income would be void, remains to be considered.

Section 2 of the Personal Property Law (L. 1897, ch. 417), after providing that the absolute ownership of personal property shall not be suspended for more than two lives in being, states that " in other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property." The Real Property Law (L. 1896, ch. 547, sec. 53) provides that " When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate." The last provision cited, therefore, refers also to personal property (Cook v. Lowry, 95 N. Y. 104).

Who is the person presumptively entitled to the next eventual estate in this case? The trustees have a present estate in the property. In case of the death of John T. Tobin before his wife, the plaintiff, she will be entitled to the fund; while in the event of Bertha Tobin predeceasing her husband the property will go to Henry S. Kiefer. The trust was made primarily for the benefit of the plaintiff, and it seems to me that, within the meaning of the statute, she is the person presumptively entitled to the next eventual estate.

The testatrix also directed the accumulation of income upon a legacy given by her to her infant grandson, Henry S. Kiefer, until the legatee should reach the age of twenty-five years. Such direction as respects the time beyond the minority of the infant is void, but the bequest and the accumulation until the infant arrives at his majority are valid (Kilpatrick v. Johnson, supra). Said legatee is therefore entitled to the income earned by the fund after his twenty-first birthday, and when he arrives at the age of twenty-five years to the fund as it shall exist on his twenty-first birthday (see Lang v. Ropke, 5 Sandf., 363).

Submit form of decision and decree in accordance with these views.

Judgment accordingly.

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JOHN WALTER RIGHTER, Plaintiff, *v.* EDWARD I. LUDWIG et al., and ANGELINE COURT, as Executrix, Etc., of ACHILLE LUDWIG, Deceased, Defendants.

(Supreme Court, New York Special Term, December, 1902.)

Real Property Law, L. 1896, ch. 547, § 284 — When the father inherits.

The provisions of the Real Property Law (L. 1896, ch. 547, § 284), declaring that a surviving father shall inherit from an intestate, who dies without lawful descendants, unless the inheritance came to the intestate on the part of his mother and she be living, apply only to a case where the inheritance came to the intestate directly from his mother.

Therefore, where she died testate and left a husband and three sons, Charles, Franklin and Edward, the latter born after her will, and the shares of the first two sons never vested in them absolutely, under the terms of the will, because they successively died intestate, unmarried and without issue, the court considered that a share which passed from Charles, upon his death, to Franklin did not on Franklin's death pass, under the statute cited, to Edward but to his surviving father, and this because Edward would not take directly from his mother and she is not living.

ACTION for partition. The facts sufficiently appear in the opinion.

Louis F. Reed, for plaintiff.

Phelps & East (Charles Henry Phelps, of counsel), for defendant Ludwig.

L. Austin Johnson, for defendants Jeannette Bacigalupo and Angeline Court.

Chas. Martin Camp, guardian *ad litem* for Marie Louise Court.

TRUAX, J. In 1863 one Achille Ludwig became the owner of the property which is the subject of this action. In 1866 he and his wife Agnes conveyed one equal undivided half of said property to Paul Jeanne, and later said Paul Jeanne and Annie, his

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wife, conveyed one equal undivided half back to Agnes Ludwig, wife of said Achille. Agnes Ludwig died in 1880, at which time she and her said husband Achille Ludwig each owned an undivided one-half of said property. On her death, in 1880, Agnes Ludwig left her surviving her husband Achille Ludwig and three sons, Charles Achille Ludwig, Franklin B. Ludwig and Edward I. Ludwig. Said Agnes Ludwig died, leaving a last will and testament, bearing date the 13th day of February, 1886, which contained the following clause in reference to the property in question: "Second. I give, devise and bequeath my undivided half part of the house and lot situated on the easterly side of Sixth Avenue and at present known by the street number One hundred and thirty-four on said Sixth Avenue * * * unto my two children Charles Achille Ludwig and Frank Ludwig, and to their heirs, executors, administrators and assigns forever, to be equally divided between them, share and share alike, and in case of the death of either of my said children during his minority without leaving lawful issue him surviving, I give, devise and bequeath the share or part of the child so dying to the survivor of them and to his heirs, executors, administrators and assigns forever, and in case of the death of both of my said children during their respective minority without either of them leaving lawful issue him surviving, then and in such case, I give, devise and bequeath the shares of both of my said children to my husband, Achille Ludwig, his heirs and assigns forever." The defendant Edward I. Ludwig was born after the execution of said last will and testament of said Agnes Ludwig and before the death of either Charles Achille Ludwig or Franklin B. Ludwig. The said last will and testament of said Agnes Ludwig was duly admitted to probate on the 3d day of October, 1880. Charles Achille Ludwig died intestate, unmarried and without lawful issue on the 6th day of December, 1886. Franklin B. Ludwig died in 1895 intestate, unmarried and without lawful issue. Achille Ludwig died on the 23d day of December, 1901, leaving a last will and testament dated September 20, 1901, which said last will and testament has been duly admitted to probate, and by which last will and testament he gave, devised and bequeathed all his interest in the property in question to the defendant Marie Louise Court, subject, however, to the use of the mother of the said Marie Louise Court — Angeline Court — of such interest in the said property

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until said Marie Louise Court should reach the age of thirty years. The will also provided that if the said Angeline Court should die before the said Marie Louise Court should reach the age of thirty years the said Marie Louise Court should come into immediate possession and title of said property. By the said will the said Achille Ludwig appointed the defendant Angeline Court executor, and gave her full power and authority to sell and convey his said real estate. The said Marie Louise Court is now of the age of seventeen years. On the 11th day of December, 1899, the said Achille Ludwig mortgaged his interest in said property to the defendant Bacigalupo, and on the 29th day of March, 1901, the said Achille Ludwig further mortgaged his property to the defendant Angeline Court, both of which mortgages are still in full force and effect. On the 3d day of March, 1902, by deed, dated on that day, said Angeline Court, as executrix of Achille Ludwig, deceased, conveyed to the plaintiff herein all the right, title and interest of the said Achille Ludwig, deceased, in said property hereinbefore mentioned. The defendants Cordes and Sparrow are tenants in said property under leases which terminate on the 1st day of May, 1903.

I decide that John Walter Righter, the plaintiff herein, is now seized in his own right in fee simple as tenant in common of, in and to seven-twelfths of the premises mentioned and described in the complaint, subject to the said mortgage to the defendant Bacigalupo and interest thereon, and subject to the said mortgage to the defendant Angeline Court and interest thereon; that the defendant Edward I. Ludwig is seized in his own right in fee simple as tenant in common of, in and to five-twelfths of said premises subject to the right of dower of his wife the defendant Julia A. Ludwig; that the defendant Jeannette H. Bacigalupo has a lien on the interest or share of the plaintiff in the sum of $1,000, with interest thereon; that the defendant Angeline Court has a lien on the interest or share of the plaintiff in the sum of $3,000, with interest thereon; that the defendant Julia A. Ludwig has an inchoate right of dower in the five-twelfths interest of the defendant Edward I. Ludwig; that the defendants John D. Cordes and Jacob Sparrow are tenants in said property under leases which terminate on May 1, 1903; that the premises hereinabove mentioned is the only real estate owned in common by the parties to this action; that there are no liens or incumbrances on the

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premises or any part thereof except as above mentioned, and that the premises are so situated as to be incapable of actual partition, and I order judgment accordingly, with costs of this action.

The grounds of this decision are as follows: Section 284 of the Real Property Law provides that, "If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided." On the death of Charles Achille Ludwig, Achille Ludwig owned one-half of said property in fee and held an interest for life in a portion of the rest of the property. Franklin B. Ludwig owned one-sixth in fee which came to him from said Agnes Ludwig, and Franklin B. Ludwig also owned one-twelfth in fee which descended to him from said Charles Achille Ludwig. Edward I. Ludwig owned one-sixth in fee which came to him from said Agnes Ludwig and he also owned one-twelfth in fee which came to him from Charles Achille Ludwig. On the death of Franklin B. Ludwig the one-sixth which he had received from his mother Agnes Ludwig descended to the sole surviving brother the said Edward I. Ludwig. The one-twelfth which he received from his brother Charles Achille Ludwig descended to his father Achille Ludwig. This one-twelfth came to said Franklin B. Ludwig under section 284 of the Real Property Law, and would not go to the defendant Edward I. Ludwig unless it came to the said Franklin B. Ludwig "on the part of his mother and she be living." I have not been able to find a case exactly like the present, but a similar point was considered in the Court of Appeals in Wheeler v. Clutterbuck, 52 N. Y. 67. The facts in that case were that one Richard Tighe died intestate, seized of certain real estate and leaving a widow and two children Patrick and Letitia. The widow remarried and by the second marriage had one son William. Letitia then died intestate without descendants and thereafter Patrick also died intestate without descendants, leaving his mother and his half-brother William alive. It was held that as to the undivided one-half of the land which came to Patrick by descent from his father William the half-brother was excluded from inheriting because he was not of the

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blood of the father of Patrick and that the mother took the inheritance in fee; that as to the other undivided one-half which came to Patrick by descent from Letitia, subject to the life estate of the mother William took the inheritance subject to such life estate, he having been born of the same mother and thus being of the blood of Letitia. The court said that section 15 of the statute (1 R. S. 753) concerning descents which provides that in case an inheritance came to an intestate by descent, devise or gift of one of his ancestors all those not of the blood of such ancestor shall be excluded from such inheritance, refers to the immediate ancestor from whom the intestate received the inheritance, not a remote ancestor who was the original source of title, and that the term "ancestor" when used with reference to the descent of real property embraces collaterals as well as lineals through whom an inheritance is derived. Following this ruling Charles Achille Ludwig and not Agnes Ludwig was the ancestor from whom Franklin B. Ludwig received one-twelfth of the estate, and this one-twelfth so received went to Achille Ludwig. In Valentine v. Wetherill, 31 Barb. 655, the court said in interpreting the same statute: "The statute looks only at the last possession of the inheritance, and does not refer to the original source of title." To like effect are Hyatt v. Pugsley, 23 Barb. 300; Adams v. Anderson, 23 Misc. Rep. 705; Emanuel v. Ennis, 48 N. Y. Super. Ct. 430.

Judgment accordingly.

SOLOMON RANGER, Suing on his own Behalf and on Behalf of all Other Bondholders of the TENNESSEE CENTRAL RAILROAD Co., Plaintiff, *v.* ERNST THALMANN and RICHARD LIMBURGER, Composing the Firm of LADENBURG, THALMANN & Co., Defendants.

(Supreme Court, New York Special Term, December, 1902.)

Principal and agent — Complaint against an undisclosed principal — Election.

A complaint, on behalf of bondholders under a railroad mortgage, which alleges that, upon a foreclosure and a sale by a master in chancery, a third person bid in the mortgaged property for a firm, whose obligations the defendants have assumed, for part cash furnished by the old firm and part notes made by him, the master re-

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taining an express lien on the property sold to secure the notes, that they, not being paid by the third person, another sale was ordered, had, and confirmed, that the proceeds of the sale satisfied the payments ordered by the decree, that the old firm thereafter took the property and paid all the expenses in regard to the matter, and that, subsequently, the master, not then knowing that the third person had been acting as agent, sued him for a balance due upon the notes without result, states a good cause of action against the defendants to recover of them, as undisclosed principals, the amount due upon the notes.

Suing upon an obligation of a person, at a time when his agency was undisclosed, does not show an election by the plaintiff to hold him and release his undisclosed principals, nor does a recovery against him release them.

THIS action is brought by the plaintiff, suing on his own behalf, and on behalf of all other bondholders of the Tennessee Central Railroad Company, to recover a balance of $11,975 remaining unpaid of a bid made by one C. O. Godfrey, as the agent of the defendants, upon a foreclosure sale in the Chancery Court of Tennessee.

Arthur C. Palmer, for plaintiff.

Underwood, Van Vorst, Rosen & Hoyt, for defendants.

WRIGHT, J. The mortgage was made by the railroad company to secure an issue of $250,000 in bonds. On the sale by the master in chancery, Godfrey bid in the property for $20,000 and paid thereon $2,000 cash, and gave his individual notes for the balance. The master retained an express lien on the property to secure the payment of the notes. This sale was confirmed by the court.

The notes not being paid another sale was decreed, upon which $6,025 were realized, which sale was duly confirmed. The amount realized on these sales was sufficient for the payments directed by the decree so that the bondholders are entitled to the surplus.

An action was brought by the master against Godfrey upon his promissory notes; judgment was obtained for the balance due; execution issued and was returned unsatisfied. When this case was before the Appellate Division on a demurrer to the original

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complaint (65 App. Div. 5), Judge Ingraham, in his opinion, said: "The only allegations connecting these defendants with the transaction is that they directed Godfrey to purchase the property in their behalf as their agent; that such purchase was made by Godfrey pursuant to such instructions, * * * that during all the proceedings had in said action under the bid made by Godfrey, including the final decree confirming the sale, the said Godfrey was the agent of said firm and acted on their behalf. * * * It is not alleged that the defendants paid the consideration or even became the owners of the property. No trust resulted in their favor, nor does it appear that the defendants would have been entitled to the property as against Godfrey. When, therefore, * * * the special commissioner assumed to hold Godfrey as the purchaser, and to collect the notes, * * * without making a request or giving notice to these defendants or their predecessors as principals, it seems that he elected to hold Godfrey as the principal. * * * It is not alleged that the relation of the defendant to the transaction was that of an undisclosed principal, or that at the time the special master sought to enforce the obligation against Godfrey the relation of the defendant to the transaction was unknown either to the plaintiff or those acting in his behalf."

For these objections the demurrer was sustained. But by the amended complaint the objections are cured, by proper allegations. The amended complaint in addition to the allegations of the original complaint, alleges, in effect, that Godfrey bid off the property pursuant to an agreement theretofore made with a firm whose obligations the defendants have assumed; that said firm furnished Godfrey with the cash payment of $2,000, and authorized the giving of said notes, and, after the sale was confirmed by the court, ratified the purchase, paid all expenses incident thereto, and accepted the property, and paid all expenses incurred in caring for the same after the purchase.

Therefore, taking all the allegations together, the firm was the purchaser of the property by its agent Godfrey, made the cash payment through him, and the sale being confirmed by the court, became obligated to pay the balance of the bid as represented by the agent's promissory notes. When, therefore, the agent took the title in his own name a trust resulted to the firm and it became the equitable owner.

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The amended complaint also contains the allegation additional to those in the original, as follows: That the master in chancery, prior to the return of the executions against Godfrey, had no knowledge or information that said firm was his principal, or was interested in the purchase.

The master in chancery having no knowledge or information that the firm was Godfrey's principal, did not elect to hold the agent instead of the principal. Such an election requires, as the very term implies, knowledge or information of the existence of the relationship of principal and agent. In that way only is an opportunity afforded for an exercise of a preference. Kayton v. Barnett, 116 N. Y. 625; Remmel v. Townsend, 83 Hun, 353; Brown v. Reiman, 48 App. Div. 295; Albany Hardware & Iron Co. v. Day, 11 id. 230; Rochester Distilling Co. v. Devendorf, 72 Hun, 428.

The fact that the master in chancery obtained judgment against the agent on his promissory notes did not release the undisclosed principal from its original obligation. Ib.

The demurrer must, therefore, be overruled, with costs, with leave to the defendants to answer within twenty days after the service of the interlocutory judgment to be entered hereon.

Demurrer overruled, with costs, with leave to defendants to answer within twenty days after service of interlocutory judgment to be entered hereon.

BLANCHE KIRKLAND, Plaintiff, *v.* GEORGE B. KIRKLAND, Defendant.

(Supreme Court, St. Lawrence Special Term, December, 1902.)

Bill of particulars — When an attorney for a party may make the moving affidavit.

The rule of practice, that a motion to procure a bill of particulars must be upon the affidavit of the party and not upon that of his attorney, is not absolute.

Where a complaint for divorce was entirely indefinite as to the time, place, or person, when, where, or with whom, the adulteries charged therein were committed, and all charges were denied by a verified answer, such a motion was granted upon the defendant's

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attorney's affidavit that he could not safely go to trial without particulars as to the times, places and persons — the court considering that, as the case was one where a bill should be ordered and the defendant clearly could have no knowledge of the particulars superior to that of his attorney, the attorney was the better judge whether the case could safely be tried without them.

MOTION for a bill of particulars in an action for divorce.

Arthur T. Johnson, for plaintiff.

E. O. Hurlburt (Lawrence Russell, of counsel), for defendant.

KELLOGG, J. M., J. The complaint charges the defendant with adultery at divers times during the years 1900 and 1901, in the town and village of Gouverneur, with inmates of houses of prostitution. It is entirely indefinite as to time, place and person with whom the adultery is alleged to have been committed. The verified answer admits the marriage, and that there is no issue, and denies every other allegation of the complaint. Upon the pleadings and the affidavit of the defendant's attorney that he cannot safely proceed to trial until he is furnished with the particulars of the alleged offense, the defendant moves for a bill of particulars as to the times, places and with whom the alleged adultery was committed. The plaintiff objects to the hearing and granting of the motion solely upon the ground that the moving affidavit is made by the attorney and not by the defendant. As this objection is the only one argued it is the only one that will be considered in disposing of the motion.

The Code of Civil Procedure, section 531, authorizes the court to direct a bill of particulars, but makes no requirement that it must be upon the affidavit of the party or otherwise. The authorities, however, are quite uniform that the application must be made upon the affidavit of the party to the action and not his attorney. Cohn v. Baldwin, 74 Hun, 346.

The reason of this rule seems to be that as the motion rests in the sound discretion of the court upon the facts shown, the attorney, ordinarily, cannot swear as to what knowledge or information his client has, and that the affidavit of the party himself furnishes the court the best information upon that subject. In

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the Cohn case the court says the affidavit of the attorney does not show that the defendant required any bill of particulars. In Mungall v. Bursley, 51 App. Div. 380, the affidavit of the attorney was insufficient as it did not show that he possessed any knowledge of the facts upon which the application is based. In Sanders v. Soutter, 54 Hun, 310, the affidavit of the attorney was held to be sufficient as the complaint upon its face indicated the probable necessity of particulars to prevent surprise and that the attorney and not the client was the best judge as to whether a proper answer could be interposed without the information sought. It is fairly to be gathered from the authorities that while the affidavit must, in most cases, be made by the party, that this necessity arises ordinarily from his superior knowledge of the facts, and that the court is better satisfied as to the necessity of the application where the party swears. In this case the complaint is indefinite and entirely uncertain, and if an application had been made before answer to make it more definite and certain, the inspection of the complaint would require such relief to be granted. Here the defendant, by a verified answer, denies the adultery. The attorney is a better judge of whether he can safely proceed to trial without the particulars desired than the client, and it is apparent from the complaint that no matter how innocent the defendant may be, if the case is to be pressed against him, he would proceed to trial under the greatest disadvantage without the particulars sought. This seems to be a case where an affidavit can allege no new facts, and where all that is necessary for the success of the motion is to have the attention of the court drawn to the pleadings, and it seems that the affidavit of the attorney that he cannot safely proceed to trial upon the complaint in its present form is all that is necessary to satisfy the court that the defendant is entitled to the relief asked. The motion is granted, and an order may be submitted to plaintiff's attorney and the court, requiring the time, place and the name or description of the parties, to be stated with reasonable certainty.

Motion granted.

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Matter of the Final Accounting of KATIE BIGGARS, as Executrix of the Last Will and Testament of CATHARINE WERNER, Deceased.

(Surrogate's Court, Dutchess County, December, 1902.)

Trust, in a savings bank deposit — Failure to inform the donee in regard to the trust — Effect of the donor's withdrawals — Expenses of administration.

Where a mother opens a savings bank account "in trust" for her daughter, and thereafter declares to others that she has done so, the valid trust thus created is not invalidated by the facts that she did not inform her daughter of the trust, always retained the bank book, and made, at different times during nineteen years, large withdrawals from the fund.

The *corpus* of such a trust is no part of the donor's estate.

The daughter can make no claim against her mother's estate because of the latter's withdrawals, as the latter was not bound to maintain the fund at the highest point it had ever reached, and particularly where it appears that the daughter had the benefit of some of the withdrawals.

Traveling expenses cannot be allowed an executrix where they were not necessary to the performance of her duties as such.

PROCEEDINGS upon the final accounting of an executrix.

C. Morschauser, for executrix.

Homer E. Briggs, for guardian *ad litem*.

James E. Carroll, Allison Butts, A. M. & G. Card and Frank J. Connelly, for legatees.

HOYSRADT, S. The legatees under the will of Catharine Werner have filed objections to the account of the executrix claiming that she should not be credited with an item of $500, alleged to be due her from the testatrix, nor with $115 for personal expenses, and that she should be charged with $2,286.34, which was deposited in

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the Poughkeepsie Savings Bank in the name of "Catharine Werner, in trust for Katie Hydrant."

The executrix is at various places in the record referred to as Katie Werner, Hydrant, Williams and Biggars.

Catharine Werner, who had for many years been a widow, died January 25, 1901, at the age of eighty-five. She left a will which was admitted to probate in this court. By this will no general legacy is provided for the two daughters of the deceased and it is evident that the testatrix assumed that she had made suitable provision for them in her lifetime.

On July 8, 1882, Catharine Werner deposited $300 in the Poughkeepsie Savings Bank in the name of "Catharine Werner in trust for Katie Hydrant." From the date of the first deposit to January 8, 1901, the bank-book shows that forty-five deposits, varying in amount from $19 to $300, were made and credited to this account and during the same period $460 was withdrawn October 6, 1887; $450, January 7, 1888; $200, April 28, 1888; $765, May 5, 1888; $500, February 18, 1898 and $500, April 16, 1898. The balance remaining in the account at Mrs. Werner's death was $2,286.34, which, on February 11, 1901, was paid to the beneficiary Katie Biggars.

Previously to the opening of this account Mrs. Werner had an individual account at the same bank, No. 20,822, which, at the time of the opening of the trust account, was $4,206.74, and the excess of $3,000 was earning no dividend. It appears to have been her intention in withdrawing the $1,200 from the individual account, July 8, 1882, to reduce it to the amount limited by the rules of the bank for earning capacity but she only deposited $300 in the trust account at that time. Some of the items of the trust account indicate that they are transfers of interest from other accounts. While there is some evidence of Mrs. Werner's effort to obtain interest on the whole of her accumulations, it is quite apparent that at the time of opening the trust account with a deposit of $300, she intended to establish a trust fund for the benefit of her daughter Katie. The evidence shows that this daughter married in 1875, went to England about 1881, returned several years afterward and, after living home for two years, went to Chicago where she resided until her mother's death. Mrs. Werner gave her daughter Sophie $1,000 and while Katie was at Chicago, offered to send her $500, but at Katie's request, post-

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poned the gift. Mrs. Werner and her daughter Katie were frequently seen at the savings bank in question together, presumably in the period of two years when the daughter was home.

Among Mrs. Werner's neighbors was the Steitz family, of German nationality like herself, and at their house she frequently spoke of her family and her property. She said that her boys were reckless in some ways and did not please her but that she had given them their property alone and the girls theirs alone and had given them as much as she could so, as she expressed it, "They couldn't claim the girls' property." She there frequently stated also that she had a bank-book for Katie in the Poughkeepsie Savings Bank, which was to be her's (Katie's) after her (Mrs. Werner's) death. She said Katie had never had any assistance from her where the others had, as she had left home young. She also said she had deeded a house to Katie with a provision that Katie should pay to Sophie, another daughter, $1,000. I find the value of this property to be $2,700.

In the Lauer household Mrs. Werner on numerous occasions spoke of her property and the disposition she intended making of it. Mrs. Lauer expressed disapproval of compelling Katie to pay Sophie $1,000 from the Montgomery street property to which Mrs. Werner replied that she had Katie well provided for by a deposit in the savings bank in trust for her. To Mrs. Schattle a similar declaration was made. With this evidence of Mrs. Werner's intention of providing for her daughter I cannot find that she merely opened the account in question to get interest on the excess of $3,000 of her savings, notwithstanding that she retained the bank-book and made withdrawals. It is evident that in these conversations Mrs. Werner did not refer to her daughter's individual account as it appears that she always referred to a trust account and spoke of it as being in her control until her death. It does not appear that Katie's individual account was in any manner in the control of her mother.

The evidence of disposition of money withdrawn from the various accounts is too vague for adoption and no substantial inference can be drawn from the fact that the will, executed May 26, 1898, provided for legacies of $3,025 when the testatrix had but $3,000 in her own name. The will contains no residuary clause and it was the evident intention of the testatrix to dispose of the whole of her personal estate of $3,000 without regard to her

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funeral expenses. Any inference to be drawn from the will itself favors a finding that Mrs. Werner did not regard herself as the owner of the trust account.

I am of the opinion that the estate of the trustee is not, under the facts and circumstances of this case, chargeable with the withdrawals as she was under no obligation to the beneficiary to maintain the fund at the highest point it might reach and for the further reason that it appears that on the same day, April 16, 1888, $500 was withdrawn from the trust account and the same amount was deposited to Katie's credit in her individual account and there are indications that she had the benefit of other withdrawals. After declaring the original trust of $300 and with no intention shown on the part of the trustee to permanently establish a fund larger than the balance remaining at her death it would be manifestly unjust to take practically all of her estate to restore the money withdrawn from the trust account. The cases where such relief has been allowed presented situations vastly different than the one in the case at bar. The contestants have raised the question that if the trust account was made for the daughter's benefit by taking $500 from it and depositing it to the credit of her individual account she was being paid with her own money but the circumstances show it to have been an advancement and the fulfillment of the proposed gift which the beneficiary might enjoy in the donor's lifetime.

It is not essential that the property should be actually possessed by the *cestui que trust* nor that the latter should be informed of the trust. The retention of the pass-book by the trustee is not inconsistent with the completeness of the gift. Martin v. Funk, 75 N. Y. 134.

In Mabie v. Bailey, 95 N. Y. 206, one of the leading cases on this subject, the enjoyment of the benefits of the trust was postponed until the beneficiaries reached suitable age. In this case the trustee had a large number of deposits in his name as trustee for various persons, enabling him to receive more dividends. The deposit in question was made in 1864 and withdrawn by the trustee in 1867. The court held that an irrevocable trust was established through proof of the deposit, the exhibition of the pass-book to the beneficiary and his declaration that "the deposits for the children were large enough to amount to something when they grew up" and "would do them more good hereafter."

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In Willis v. Smyth, 91 N. Y. 297, U. deposited money in trust for her daughter. The original deposit was subsequently withdrawn and later the account was again opened by a deposit of $2,000. There was no independent declaration and, notwithstanding that, the trustee drew the interest and offered to loan the money; it was held that the transaction disclosed an intention to establish a trust.

In Beaver v. Beaver, 117 N. Y. 428, Beaver deposited money in the name of his son. There was no declaration of trust in terms when the deposit was made nor at any time thereafter and it was held that none would be implied from a deposit by one person in the name of another and that no gift was established.

In Cunningham v. Davenport, 147 N. Y. 43, where it was held that no trust was established, plaintiff made a deposit in trust for his brother. The latter died without having been informed of the account and the depositor was alive, denying the trust. Practically the same state of affairs existed in Haux v. Dry Dock Sav. Inst., 2 App. Div. 165. The doctrine of the Court of Appeals as stated in Cunningham v. Davenport, at page 47, is that the act of a depositor in opening an account in the savings bank in trust for a third party, the depositor retaining possession of the bank-book and failing to notify the beneficiary, creates a trust if the depositor dies before the beneficiary, leaving the trust account open and unexplained. If the intent can be strengthened by acts and declarations of the depositor in his lifetime amounting to publication of his intent a more satisfactory case is made out, but it is not absolutely essential, in the absence of explanation, where he dies leaving the trust account existing.

In Washington v. Bank for Savings, 171 N. Y. 166, the supposed beneficiaries were found by the jury to be fictitious and no new principle was enunciated on the appeal.

In Matter of Mueller, 15 App. Div. 66, there was proof showing the intention of the depositor not to divest himself of title.

In Decker v. Union Dime Sav. Inst., 15 App. Div. 553, one Dubois made a deposit in trust for his sister and subsequently stated that he had given plaintiff four thousand and odd dollars and said she knew of it. The court held that it was clearly his original intention to establish a trust and notwithstanding an entire change of circumstances the trust was upheld.

In Williams v. Brooklyn Savings Bank, 51 App. Div. 332, it

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was held that the opening of an account by one person in trust for another establishes *prima facie* an intention to create a trust and that the retention of the pass-book by the trustee, his failure to notify the beneficiary and a withdrawal are not sufficient to establish a contrary intention. In this case there was no independent declaration of the depositor but the account was simply open and unexplained at his death and the court held that the trust was established from the original evidence of intention and proof of circumstances.

In Robertson v. McCarty, 54 App. Div. 103, it was held that a deposit in trust for depositor's brother, although the latter did not become aware of its existence until after the death of the depositor who had retained possession of the pass-book, created an irrevocable trust, and where it had been withdrawn by the depositor and converted to his own use in his lifetime it could be recovered from his legal representatives. The fund was established by one deposit of $3,000 and was wholly withdrawn. The same principles are upheld in Scallan v. Brooks, 54 App. Div. 248, and Harrison v. Totten, 53 id. 178.

In Meislahn v. Meislahn, 56 App. Div. 566, a father deposited money in trust for his daughters, having ten deposits for one daughter aggregating $26,000 and stated that he had money in trust for the girls. He also said in substance that they could not get it until after his death. The funds were composed of numerous deposits and the depositor drew the interest. The situation was nearest to the one in the case at bar that I have found. The court there held that a trust was established.

In the most recent case, Matter of Totten, 38 Misc. Rep. 349, there was no declaration of the depositor as in the case at bar and while the circumstances proven in that case may justify it, the decision does not follow the line of cases in which Robertson v. McCarty, *supra,* is included.

The case at bar belongs in the class where the trust has been upheld and the executrix is not, therefore, chargeable with the amount of the deposit in question.

As to the next question involved it appears that Catharine Werner as executrix of Valentine Werner paid to Katie Biggars $500, from the funds of the estate of Valentine Werner, which my predecessor has decided was unauthorized, and, when Katie Biggars rendered her account as administratrix with the will annexed

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of Valentine Werner, she was charged with that payment. She now asks to have it established as a charge against the estate of Catharine Werner. In other words, Katie Biggars received, evidently as a gift, money which the donor did not own and has been compelled to restore it. I know of no authority for enforcing her claim against the donor. No consideration is proven and the only characterization which could be given to the transaction is an attempted or unexecuted gift which is not enforcible.

As to the expenses of the executrix it appears that she came to Poughkeepsie from Chicago twice. The first occasion was to attend the funeral of her mother and on the second she established a permanent residence in Poughkeepsie. It has not been shown that either trip was made necessary by the performance of her duties as executrix. The credits in her account of $500, by reason of the transaction referred to, and $115 for expenses are, therefore, disallowed.

Decreed accordingly.

Matter of the Judicial Settlement of the Estate of Mary B. Warner, Deceased.

(Surrogate's Court, Rensselaer County, December, 1902.)

Legacy — When demonstrative — Abatement — Services in the family relation — Consent and short statute as to a disputed claim against an estate — Executors' right of retainer.

Legacies of thirds, after payment of the expense of a monument to the husband of the testatrix, in "the four thousand dollars advance (profit) which I made from the sale of my property to J. W. Collins", are demonstrative, but, where no identified fund for their payment existed at the death of the testatrix, the legacies must share and abate *pro rata* with the general legacies of the will.

A claim of an executrix, the sister of a testatrix, for nursing her during the last four years of her life must be closely scrutinized and clearly supported, and especially where the testatrix who had money in hand had never made the claimant any payment whatever on account of the alleged services.

While the surrogate may upon a judicial settlement hear the disputed claim of an executrix against her testatrix' estate, he cannot then hear an ordinary disputed claim unless a consent is filed.

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Misc.] Surrogate's Court, Rensselaer County, December, 1902.

A claim against an estate is barred where executors reject it and the claimant waits two years without suing upon it or having it referred.

Where, upon a balance struck, an executor, and legatee, of an estate is found a debtor to it, the amount due him by it should be credited upon the debt in full satisfaction of his legacies and commissions.

PROCEEDINGS upon the judicial settlement of the accounts of executors.

N. B. Spalding, for executor.

W. Frothingham, for Mrs. Jenks and others.

W. Frothingham, special guardian, in person.

Joseph A. Murphy, for Susan Smith and William Smith, claimants.

HEATON, S. Judicial settlement of the accounts of Horace Bennett and Susan Smith, executors of the will of Mary B. Warner, deceased, tried before former Surrogate Hon. A. C. Comstock, and brought on for decision by me, upon notice of motion.

It is necessary to construe the will of deceased and also pass upon two alleged claims.

Mary B. Warner died April 12, 1898, leaving a will dated May 21, 1888, which was probated July 20, 1898.

Horace Bennett, a brother, and Susan Smith, a sister of deceased, qualified as executors, and on the 28th day of September, 1898, filed an inventory of the personal estate of deceased, which showed furniture, etc., of the value of $124.75, two bonds and mortgages against Horace Bennett of $1,000 and $2,422, respectively, with unpaid interest of $418 and a debenture bond of $500, on which had been paid in dividends $175, inventoried at $100, cash in Albany City Savings Bank, $518.45, and in the Exchange Bank of Albany, $557.23, and in the National Bank, Castleton, N. Y., $99.20; total, $5,240.27. By her will Mrs.

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Warner disposed of $7,000 specifically, besides giving the residue to her sister, Mrs. Smith. Deficiency of assets to pay all legacies in full has brought about a contention between the relatives of her husband, who were bequeathed $3,500, and her relatives, who were bequeathed $3,000.

The will provides as follows:

"*First.* I hereby authorize my executors, whom I shall nominate, to erect a monument over the grave of my husband (Bennett Warner) the expense not to exceed five hundred dollars, said sum of money shall be taken from the four thousand dollars advance which I made from the sale of my property to J. W. Collins.

"*Second.* I give devise and bequeath the use of one third of the balance of said four thousand dollars to Egbert L. Warner during his natural life and at his decease I give, devise and bequeath said one third of balance to his children.

"*Third.* I give devise and bequeath the use of one third of the balance of said four thousand dollars to Fannie M. Jenks during her natural life and at her decease I give, devise and bequeath said one third of balance to her children.

"*Fourth.* I give, devise and bequeath the use of one third of the balance of said four thousand dollars to Ida B. Way (daughter of Bennett Warner deceased) during her natural life and at her decease I give, devise and bequeath said one third of balance to her children."

Then follows a bequest of $2,000 to her brother Horace Bennett and the use of $1,000 to her sister Julia Ann Barton for life, with remainder over to Horace Bennett, and the residue to her sister, Susan Smith.

With gifts aggregating $7,000 and assets of less than $5,000 for distribution, it becomes a vital question whether the legacies to the husband's relatives are specific, demonstrative, or general, and whether the $4,000 fund, or any part of it, was in existence at the date of the death of Mrs. Warner, so that if the legacies of that fund were specific such money or securities could be delivered, or if demonstrative they could be paid from it.

While the intention of the testator is to be looked for in the will, and relates to the time of the execution, the general rule is well established that the will speaks as of the date of the testator's death, in reference to property, and until that event the

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specific subject of the gift is undefined. Ametrano v. Downs, 62 App. Div. 405; 70 N. Y. Supp. 833.

The evidence wholly fails to establish that "the four thousand dollars advance" existed at the time of her death in any such separate and well-defined form that it could be the subject of a specific legacy. Neither does the evidence show clearly and satisfactorily that at the time of her death the fund of $4,000, representing the advance which she made on the sale of the farm to Collins, existed as a separate and distinct fund, made up of any certain deposits or securities. There is a little evidence, conflicting, uncertain, and hearsay in character, tending to trace some part of this original money into securities now on hand, but it is wholly insufficient upon which to base a finding that such money had been in fact separated and continued as a special fund to meet the requirements of the will. Ten years elapsed from the making of the will until the death of Mrs. Warner. Either during all that time she kept the "advance" money in such form that it could be identified at her death in accordance with the scheme of her will, or she mingled it indiscriminately with her other moneys. Had she acted in the former manner there would have been abundant evidence of the identity of the fund which the able counsel would have produced. It does not appear from the evidence that at any time Mrs. Warner ever separated and set apart this fund, and therefore the evidence is wholly insufficient to trace into the securities or deposits which she left any part of the alleged "fund," which is not shown to have ever been in existence. From a careful examination of the will and the little evidence adduced it appears to have been the intention of Mrs. Warner to give to her husband's relatives and to devote to the erection of a monument at his grave the money which she made on the sale of the farm which was deeded to her by her husband. The line of separation is very clear in her will. The remainder of her property, being that acquired by her own exertions, she gives to her own relatives. Unfortunately, however, she has failed to accomplish her intention. The gifts in the second, third, and fourth clauses are not specific legacies. They are each a gift of "one third of the balance of said four thousand dollars." Such four thousand dollars is not mentioned as being on deposit in any bank or invested in any way. A fund may be referred to, but a particular fund actually existing in a particular place and

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in a defined form is not given. Hence the legacies are not specific. Matter of Newman, 4 Dem. 65; Beck v. McGillis, 9 Barb. 35; Giddings v. Seward, 16 N. Y. 365. Mrs. Warner did not give a certain bank deposit, or security or securities, but feeling that she had $4,000 which in justice ought to go to her husband's relatives, measured her gifts to them by that amount, and after providing for her husband's monument, divided the balance of said $4,000 among them. Such gifts are given out of and measured by a particular fund and are demonstrative legacies. Crawford v. McCarthy, 159 N. Y. 514.

The legacies being demonstrative, it is well settled that the fund upon which they are charged must first be applied to their extinguishment, and the balance of the legacies be classed with the general legacies and abate *pro rata* with them. Florence v. Sands, 4 Redf. 210.

The contract for monument and markers at $340 is approved as a proper disbursement from the funds of the estate.

There being no identified fund existing at the death of deceased applicable to the payment of the whole or part of the demonstrative legacies, those legacies will share *pro rata* with the general legacies on the distribution.

Two disputed claims have been presented upon which evidence seems to have been taken by this court, one by Susan Smith, the executrix, and one by William H. Smith, her son.

The claim of Mrs. Smith was presented to this court by petition dated May 5, 1900, more than five months after she filed her account and after several hearings on judicial settlement. The claim is for services rendered by her to the deceased in caring for and nursing her from November 1, 1894, to April 12, 1898, at $10 per week, amounting to $1,810.

It appears from the testimony that Mrs. Smith and her son William, in November, 1894, went to live with the deceased and continued to live in common with her in her house until her death, April 12, 1898, and both of them performed such services for Mrs. Warner as would naturally be performed by her sister and nephew when living in the house with her. The only testimony given in support of the claim is that given by the claimant, who is also executrix. There is no evidence whatever that the deceased promised to pay claimant for such services; there is

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very little evidence as to their nature and extent and none whatever as to their value.

The rule in regard to claims of this character is too well settled to require the citing of authorities that claims against the estate of a deceased person, made by near relatives, for personal services rendered in the last sickness are to be regarded with suspicion and require stronger proof to establish them than ordinary claims made by strangers.

It appears that the deceased had more than $1,000 in bank at the time of her death, and that income from her money and property was frequently paid to her during the last four years of her life while this claimant was performing these services. It would therefore seem that if there was any agreement to pay claimant for her services, at least a partial payment would have been made from time to time during such four years.

The evidence wholly fails to establish this claim and the same is therefore disallowed.

All that has been said in regard to the claim of Susan Smith might be said in regard to the claim of the nephew, William Smith, if such claim were properly before this court for determination. The claim of Susan Smith, she being the executrix of the deceased, is properly submitted for determination on this accounting, pursuant to section 2731 of the Code, but the claim of William Smith can be heard and determined on this accounting only in accordance with section 1822 of the Code by filing a written consent, executed by all the parties, which consent does not appear to have been executed and filed in this court. The reference to Mr. Mambert, the stenographer of this court, was simply to take the testimony of sick and infirm witnesses and report the same to this court, and was not and could not properly have been to hear and determine the claim.

As the claim of William Smith was presented to and rejected by said executors more than two years since and no action has been brought upon the same and no reference thereof had, the same is not considered upon this accounting.

It is conceded by all parties and it is the law of this case that the several legacies are not a charge upon the real estate left by the deceased, which passes to the residuary legatee, Susan Smith.

It appearing that the legatee, Horace Bennett, is a debtor to this estate upon two bonds and mortgages, aggregating, with

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interest, about $4,000, the amount payable to him on his legacies and his commissions should be credited upon such bonds, in full satisfaction of such legacies and commissions. Matter of Foster, 38 Misc. Rep. 347, and cases there cited.

All personal property and securities should be converted into money unless one or more of the parties file consent to accept the same in place of the cash.

Let findings and decree be prepared accordingly.

Decreed accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* CARMINE DI MEDICIS, INDICTED AS CARMINE DE MITTEO, DEFENDANT.

(Court of General Sessions of the Peace in and for the County of New York, December, 1902.)

Crimes — Allowance to counsel assigned to defend one charged with an offense punishable by death — Code Crim. Pro., § 308.

Where a defendant, charged in the indictment with an offense punishable by death, is duly arraigned therefor and then and there appears by counsel and pleads not guilty thereof, the Code of Criminal Procedure, the only authority for such an allowance, affords the criminal court, in which he was tried, no authority to make counsel assigned him as such at a later term of the court when he did not appear either for arraignment or trial, an allowance for having subsequently defended him.

APPLICATION for an allowance to counsel for services in defending the accused on the trial of an indictment charging murder in its first degree.

Ambrose H. Purdy, for motion.

No other appearance.

FOSTER, J. This is an application for an allowance to counsel for services in defending the accused on the trial of an indictment charging murder in its first degree.

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The statute permitting such allowance is a recent innovation. Prior to its enactment there was no power in the court to allow compensation to counsel, assigned by the court, for the defense of those accused of crimes (People ex rel. Brown v. Board of Supervisors, 4 N. Y. Crim. 102; People ex rel. Ransom v. Supervisors, 78 N. Y. 622), and yet to the credit of the bar be it said that there is no record or even suggestion of the failure of counsel so assigned to render zealous and satisfactory services, even though without reward or hope of reward.

Chapter 427 of the Laws of 1897 (Code Crim. Pro., § 308) provides that "If the defendant appear *for arraignment* without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. When services are rendered by counsel in pursuance of *such assignment* in a case where the offense charged in the indictment is punishable by death * * * the court in which the defendant is tried or the indictment is otherwise disposed of * * * *may allow* such counsel his personal and incidental expenses * * * and also reasonable compensation for his services in such court not exceeding the sum of five hundred dollars." It will be observed that the statute refers specifically to the *time of arraignment* and gives the court the power to make an allowance for services in pursuance of such assignment *only when the defendant then and there appears "without counsel."*

The following section (309) of the Code of Criminal Procedure defines the "Arraignment" referred to as follows: "The arraignment * * * consists in stating the charge in the indictment to the defendant, and in asking him whether he pleads guilty or not guilty thereto. In other words, the arraignment is what is commonly referred to as the "pleading."

In People v. Fuller, 35 Misc. Rep. 189, referring to the statute in question, doubt was expressed as to the power of the court to allow compensation to counsel assigned *after* arraignment or unless assigned upon arraignment. The reasonable propriety of this rule is evident. If counsel is not satisfied with the prospects of compensation he need not appear. If he does appear it is right and proper that he should look to his client, the defendant, and not to the State for compensation.

An examination of the record herein discloses that on June 27, 1902, the defendant was duly arraigned and, *with due ap-*

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pearance of counsel, his plea of not guilty was duly entered. No assignment was then made, because the defendant did not appear "without counsel," and thus the court was without jurisdiction or power to assign counsel. Probably the rule laid down in People v. Fuller, *supra,* explains why the appearance was interposed and the chance taken of applying for an assignment to another judge.

At another term of the court and before another judge and at a time when the defendant neither appeared for *arraignment* nor for trial it appears that counsel was assigned. It does not appear that when application was so made for the assignment herein, the attention of the court was drawn to the facts that the defendant had been *duly arraigned* at a prior term of the court; or that counsel *had duly appeared* on such arraignment or that the defendant's *plea had been thereupon duly had* and entered. The assignment, therefore, if not applied for with an *expressio falsi* was secured by a *suppressio veri.*

While the statute in question, being remedial, should be reasonably and liberally construed, it cannot and should not be stretched beyond the plain intendment of its language. Thus it has been held that unless the indictment is finally disposed of there is no power in the court to order compensation to counsel,

People ex rel. Cantwell v. Coler, 61 App. Div. 598, which also distinctly holds that the court has no power by a supposedly equitable construction to broaden the scope of the statute, and the "personal and incidental expenses" mentioned have been so limited as not to include moneys paid for expert testimony. Cantwell v. Coler, 104 N. Y. St. Repr. 755. It follows, therefore that the assignment under which counsel claims compensation herein is not such an assignment as the statute requires to confer upon the court the power to allow compensation, and that for the facts and reasons stated the motion herein must be denied.

Motion denied.

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PASQUALE LAURIA, Landlord, *v.* FRANK CAPOBIANCO, Tenant.

(City Court of New York, Trial Term, December, 1902.)

Summary proceedings — Costs — Code C. P., §§ 2250; 3076, subd. 2; 3240; 3253.

A landlord who succeeds in a summary proceeding, not involving a forcible entry or detainer, is entitled, under Code C. P., §§ 2250, 3076, subd. 2, to ten dollars costs and no more, and is not entitled to an extra allowance under Code C. P., § 3253.

Code C. P., § 3240 does not apply to a summary proceeding.

APPLICATION for an award of costs, and an extra allowance upon settlement of final order.

Alexander Finelite, for tenant.

Merrill & Rogers (Alfred H. Holbrook, of counsel), for landlord.

SEABURY, J. This is an application for an award of costs and an extra allowance in a summary proceeding to recover the possession of leased premises. The proceeding was tried before me with a jury and resulted in a verdict in favor of the tenant. The contention of the tenant is that he is entitled, in the discretion of the justice presiding at the trial, to the same costs as those allowed in an action in this court under section 3240 of the Code of Civil Procedure. The questions litigated upon the trial were of such a character that if the matter were discretionary with me I should award the amount of costs asked for by the tenant.

I can find no warrant in the statute for such an award of costs. A party seeking an award of costs must be able to point to some statute authorizing the award, as the whole subject is entirely regulated and controlled by statute. In Levene v. Hahner, 62 App. Div. 195, the court said: "Costs are regulated by statute and therein must be found the answer to the question, when raised, as to what costs and in whose favor the same are taxable."

After a careful examination of the statutes the only provision which I have been able to find authorizing an award of costs in proceedings of this character is section 2250 of the Code of Civil

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Procedure. This section provides that "Costs, when allowed, and the fees of officers, except where a fee is specially given in chapter twenty-one of this act, must be at the rate allowed by law in an action *in a justice's* court, and are limited in like manner." The only exception to this rule being when the application is founded upon allegations of forcible entry or forcible holding out, which has no application to the present case.

The argument of counsel for the tenant that because this is a special proceeding in a court of record the full costs of an action may be awarded is untenable. Section 3240 of the Code of Civil Procedure, upon which counsel bases this contention, provides that "Costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party, in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner."

This section does not apply to all special proceedings instituted in a court of record, but only to those special proceedings "where the costs thereof are not specially regulated in this act." The costs taxable in summary proceedings are "*specially regulated*" by section 2250 of the Code of Civil Procedure, wherein they are expressly limited to those allowed in a justice's court except in cases of forcible entry and forcible holding out. The costs of the prevailing party in proceedings of this character in a justice's court are limited to ten dollars. Code Civ. Pro., § 3076, subd. 2.

Counsel for the tenant also contends that the court may award an extra allowance under section 3253 of the Code of Civil Procedure. This section, however, is limited in its application to actions and does not apply to special proceedings, even where the proceeding is regularly tried before a jury, and is analogous in its purpose and scope to an action. Rensselaer & Saratoga R. R. Co. v. Davis, 55 N. Y. 145; Matter of Application of Holden, 126 id. 589.

I conclude, therefore, that the tenant is entitled only to an award of ten dollars costs and the application for an extra allowance is denied.

Application denied.

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JAMES TALCOTT, Plaintiff, *v.* THE WABASH RAILROAD CO., Defendant.

(Supreme Court, New York Trial Term, December, 1902.)

Carrier — Passenger's independent contract for the carriage of goods not his own — Measure of damages.

A passenger may, by a contract independent of that for the transportation of himself and his baggage, bind a railroad carrier to his employer, as undisclosed principal, for the transportation with himself of samples of the latter's goods.

Such a contract may exist where the passenger pays, and the carrier's checking agent accepts, the proper excess baggage rates on trunks containing, among other things, the employer's goods and the agent checks the trunks and gives a voucher for the excess payment.

Damages cannot be awarded unless there is an accurate basis for them.

ACTION to recover the value of certain property destroyed while in transit.

Bunnell & Bunnell (Charles E. Hughes, of counsel), for plaintiff.

George F. Brownell (George F. Brownell and C. V. Nellany, of counsel), for defendant.

FITZGERALD, J. It is unnecessary to make any detailed statement of the facts as disclosed by the testimony submitted herein for the reason that they are fully set forth in the opinion of the learned court above. Talcott v. Wabash R. R. Co., 159 N. Y. 461. But one question, outside of the subject of damages, remains to be determined: What in fact was the contract entered into by plaintiff's agent with defendant for the transportation of the excess weight of the material carried in trunks for which extra charges were made and paid? Plaintiff's agent purchased from defendant for his own use a passage ticket which entitled him to carry a limited amount of baggage free; baggage in excess of this limit

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might be carried upon payment of an extra charge. The passenger in this case was a commercial traveler in plaintiff's employ, and it appears to be customary with railway companies to carry in the ordinary baggage cars accompanying passenger trains, trunks containing samples of the various lines of stock, the sale of which the commercial agent is engaged in, and it has been held that he may, by an independent contract, bind the railway company to his employer for the transportation of such property entirely independent of the ordinary agreement which usually arises from the purchase of a passage ticket for the carrying of the passenger's personal effects. Millard v. Missouri, Kansas & Texas R. R. Co., 86 N. Y. 441. The law is well settled that a railway company which sells a passage ticket giving the right of travel from one place to another, but which ticket clearly indicates by coupon or otherwise that the journey to be made extends beyond its own terminus, and is to be continued over connecting lines, acts, in so far as the sale of the ticket is concerned, merely as the agent of the connecting line, and is not responsible for baggage further than to transfer it safely to the custody and care of its principal. Milnor v. N. Y. & N. H. R. R. Co., 53 N. Y. 363; Kessler v. N. Y. C. & H. R. R. R. Co., 61 N. Y. 538. The passenger in this instance had with him four trunks, and in these trunks property was contained belonging to various parties; part of said property belonged to plaintiff, part to the New Britain Knitting Company, part to the American Hosiery Company, and the remainder consisted of personal effects. All of the trunks were safely delivered by defendant company at the terminus of its line at Detroit to the Grand Trunk Railway, and while in transit over this latter line a fire occurred by which three of the four trunks were destroyed. A voluntary nonsuit was submitted to upon the trial on the causes of action setting forth the loss of the property belonging to the New Britain Knitting Company and the American Hosiery Company, and it is *res adjudicata* in this case that defendant was not liable for the loss of the passenger's personal effects. Talcott v. Wabash R. R. Co., *supra*. Is it liable for the loss of plaintiff's property? The answer to this question depends on the terms of the second contract. What was the consideration paid and what was it, as understood and agreed between the parties, that was to be done? Assuming that the payment of sixteen dollars constituted the consideration for which all of the excess weight was carried,

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the property so paid for belonged to different owners, it was charged for in bulk, the trunks were not separately weighed. One was subsequently returned, but there is no evidence of its weight. One of those lost belonged to the knitting and the hosiery companies, and its weight is equally unascertainable. For aught shown to the contrary the entire extra charge may have been paid for the goods contained in these two trunks, but to add to this confusion it appears from the record that the passenger's personal effects weighed only fifty pounds, and that testimony conclusively establishes the fact that he was permitted to carry one hundred pounds of some of these various other owners' property free upon his ticket. Upon no possible theory could defendant be held liable for the loss of goods to the extent of this one hundred pounds. I have eliminated the purchase, possession and presentation of the ticket by the passenger at the time of the shipment of the trunks as constituting any part of the consideration for which excess weight was carried, but must not the terms and conditions of that ticket be considered at least as evidence tending to establish what was in his mind when the second agreement was made? Did he not desire to take all the trunks upon the train on which he was personally traveling? Were not the limitations as to the risks assumed annexed to his coupon ticket present before him when making the second contract? Do not the marks upon the pasteboard check and brass checks given him by the baggage agent show that the trunks were to go beyond the terminus of defendant's line and upon the lines of other railway companies, and would it not be unreasonable to hold in view of all these facts that two distinct and different propositions were mutually simultaneously present in the minds of the contracting parties, one a contract upon the ticket limited as to defendant's liability by its terminus at Detroit and the other a contract binding the defendant for the excess covering the entire journey from Chicago to New York? No matter how these matters may be viewed it would be utterly impossible for the reasons previously shown to arrive at any accurate measure of damages, and plaintiff's complaint must be dismissed.

Complaint dismissed.

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PATRICK W. CULLINAN, as State Commissioner of Excise, Plaintiff, *v.* FRANK L. PARKER and THE FIDELITY AND CASUALTY Co., Defendants.

(Supreme Court, New York Trial Term, December, 1902.)

Liquor Tax Law — How long the liability of a surety upon the bond of a certificate holder continues.

Where business is ostensibly being carried on under a liquor tax certificate and it has not been duly transferred or surrendered, a surety company, which has covenanted that the certificate holder will not, while the business for which the certificate is given shall be carried on, suffer or permit any gambling to be done in the place designated by the certificate or suffer or permit the premises to become disorderly, is liable upon its bond if violations occur in the place, and this although the holder of the certificate has parted with his interest in the business and no longer has any control over it.

ACTION to recover the penalty of a bond for an alleged violation of the Liquor Tax Law.

H. H. Kellogg, for plaintiff.

Nadal & Carrere (C. C. Nadal, of counsel), for defendant Fidelity and Casualty Co.

KEENER, J. The plaintiff sues to recover the penalty of a bond for an alleged violation of the Liquor Tax Law. The following facts are established by the evidence:

1. There were violations of the Liquor Tax Law on the premises designated in the certificate issued to the defendant Parker as the place for the sale of liquors.

2. Such violations occurred after Parker had ceased to be the proprietor in fact of the premises, and had sold his interest in the business, retaining no control thereof.

3. At the time of such violations the certificate had not been transferred under section 27 of the Liquor Tax Law, nor had it been surrendered under section 25 of said act, and the business was conducted ostensibly under said certificate.

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It is urged that the defendant surety company is not liable on its bond because the violations occurred after such sale. The contention is based on the language of the condition in the bond that "the said principal will not, while the business for which such liquor tax certificate is given, shall be carried on, suffer or permit * * * any gambling to be done * * * in the place designated by this liquor tax certificate * * * or suffer or permit such premises to become disorderly." In my opinion this contention is not well founded. The Legislature, by the careful provision made for the transfer or surrender of liquor tax certificates, has clearly evidenced an intention to look, in the absence of such formal transfer or surrender, to the person to whom the certificate is issued as the one responsible for the management of the place so long as the business is conducted ostensibly under that certificate. For this reason it has been held that an action can be maintained for the cancellation of the certificate and for the recovery of incidental costs, though there was a transfer of the business before the violation complained of. Matter of Cullinan, (Kuch Certificate), 39 Misc. Rep. 641. Although the action against the surety is on its contract of suretyship, the bond was given in pursuance of the Liquor Tax Law, and must be construed with reference thereto, and I think the language of the bond does not justify a construction which would clearly violate the policy of the statute. The condition of the bond does not provide in terms that the surety shall answer for violations of the Liquor Tax Law while the principal is conducting the business, but that the surety shall be answerable for violations of the law while the business for which such liquor tax certificate is given, shall be "carried on" on the premises. The business for which the certificate was given to the defendant Parker was being "carried on" on the premises designated in the certificate, and ostensibly under that certificate. That Parker had no interest in the business is, in my opinion, immaterial, and the violation proved renders the surety liable on its bond. Judgment for the plaintiff on the verdict.

Judgment for plaintiff.

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THE PEOPLE ex rel. EDWARD F. CROKER, Relator, *v.* THOMAS STURGIS, Fire Commissioner of the City of New York, Respondent.

(Supreme Court, New York Special Term, December, 1902.)

Stay — Vacated, when accompanying the allowance of a writ of certiorari to review, and designed to stay the execution of, a determination of a superior city officer dismissing his inferior for cause — Power of the fire commissioner of New York city — Merits — Bias and prejudice — Stay not granted of course — Effect on a stay of Code C. P., § 2131.

An order, allowing a writ of certiorari to review a determination of the fire commissioner of the city of New York dismissing for cause and after a hearing the chief of the city fire department, should not contain a provision staying execution of the determination until review had.

The commissioner has power to try the chief.

The stay will be vacated on motion where it has been granted *ex parte*.

The stay cannot be supported upon the ground of alleged erroneous rulings of the commissioner nor because his determination is alleged to be against the law and the weight of evidence and this because those questions are for the Appellate Division. Code C. P., § 2140.

The stay cannot be supported upon the ground of the commissioner's alleged bias or prejudice where the court at Special Term cannot determine from the record that, assuming they existed, they affected the result.

A stay should not be granted in such a case as a matter of course as the interests of the public service require that there should be no stay.

Code C. P., § 2131 has not enlarged the right to have a stay in a writ of certiorari, or an order for a stay, but has limited it, and thus has changed the common-law rule under which the writ itself involved a stay and effected it.

APPLICATION to vacate so much of an order allowing a writ of certiorari as granted a stay of execution of respondent's deter-

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mination, dismissing the relator, as chief of the fire department, after a trial had on charges duly made.

John T. Delany, for relator.

George L. Rives, Corporation Counsel, for respondent.

LEVENTRITT, J. This is an application to vacate so much of an order allowing a writ of certiorari as granted a stay of the execution of the respondent's determination, dismissing the relator, as chief of the fire department, after trial had on charges duly made. The writ and stay were granted *ex parte* on the affidavits of the relator, his counsel, and of several newspaper reporters. The record of the trial was not presented to the court, nor is it before me on this application. The papers submitted to the justice who granted the stay contain a more or less detailed history of the relations between the relator as chief of the uniformed force and the respondent as commissioner of the fire department, the main purpose of the recital being to show bias and prejudice. There is some statement as to the occurrences at the trial and certain extracts of the testimony are incorporated in the affidavits to support the charge of bias and prejudice. This is the main ground of error relied on; others alleged were that the respondent was, by reason of interest and the pre-existing bias, incompetent to act as trial judge and that his deputy was, under the law, competent to try the charges and should have been designated to do so; that rules of law were violated to the prejudice of the relator; that erroneous rulings were made; that the charges were not proven, and that the commissioner's decision was against the weight of evidence and, therefore, illegal.

The allowance of the writ of certiorari itself was, on the facts shown, entirely proper. Hence no attack is here made upon it. The propriety of the stay is the only question involved on this motion. The application for a *vacatur* is based on the affidavits of the respondent; of the assistant corporation counsel who conducted the prosecution; of the chief clerk in the corporation counsel's office, and on that of an attorney who for many years was counsel to the fire department. The respondent's affidavit contains his version of the relations between himself and the relator and a specific denial of all charges of bias or prejudice; that of the

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assistant corporation counsel concerns itself with the conduct of the trial, and the statement that in his opinion the respondent acted fairly and accorded the relator his full rights; the chief clerk makes affidavit that in forty-five years' service in the corporation counsel's office during which period all papers in certiorari proceedings passed through his hands, he has knowledge of no instance where an order was ever granted allowing a stay in a case where a public board or officer removed a subordinate.

The attorney swears that as a result of his long experience as counsel to the department, the continuance of the stay would, in his opinion, work demoralization and disorganization in the uniformed force.

The answering affidavits contain additional extracts from the minutes of the trial, further charges of bias and prejudice and averments in reply to the attorney's affidavit negativing the assertion of demoralization and disorganization.

The *vacatur* is sought on three grounds: *First.* That the court had no power to make the stay; *secondly,* that if such power existed it was improvidently exercised, and *thirdly,* on the merits.

I do not deem it material to consider the various affidavits in further detail. It is quite unnecessary for the purposes of my decision which I place on broad grounds. Nor do I wish my decision interpreted as in anywise constituting an approval of the conduct of the trial so far as the same is disclosed by the affidavits before me and the uncontradicted excerpts from the record. The propriety or impropriety of the conduct of the trial, the due safeguarding of the rights of the relator, errors of law and questions of the weight of evidence within section 2140 of the Code of Civil Procedure, must be left for the decision of the Appellate Division.

Even were the entire record of the trial before me, it would not be incumbent upon me, nor even proper, to review the testimony, even though the reading satisfied me that I should reach a different conclusion than the officer whose decision is in question. The method of reviewing his decision is furnished by the Code. The grounds are specified for which the Appellate Division may reverse. Code, § 2140. Giving the broadest possible construction to the section authorizing a stay in certiorari proceedings, I am of the opinion that it was not the purpose of the Legislature that the judge of whom the stay is asked should in any case, grant it merely because he discovers an error of law or because if a ver-

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dict had been rendered thereon by a jury it would be set aside as against the weight of evidence. Such an intermediate or halfway interference with the functions of the appellate tribunal would be as unwarranted as it is uncontemplated. The stay in those classes of cases where it is proper must have other considerations to support it. I reject, therefore, those points urged by the relator which are based on erroneous rulings, errors of law or questions of the weight of evidence. Nor is there any force to the contention that the respondent was not qualified to act. The question here is not as to the propriety of his acting under all the circumstances of the case. The question is did he have the power? There is no doubt that he had. It is given by statute. In a similar case it has the support of authority. People ex rel. Meyer v. Roosevelt, 23 App. Div. 514; affd., 155 N. Y. 702.

There remains then the question of bias and prejudice. Conceding, for the sake of argument, that on the application for a stay, the court may properly inquire into their existence for the purpose of controlling its discretion, and conceding even that the Appellate Division will reverse on that ground, I still cannot see how, at this stage, they can avail the relator. Bias and prejudice *per se* can afford no ground for a stay, just as little as bias and prejudice *per se* constitute a ground for reversal. It is bias and prejudice tainting or affecting the result. Grant that the respondent showed *animus* or even that he prejudged the guilt of the relator, if there was, nevertheless, uncontradicted evidence supporting any one of the charges, evidence of a kind that would satisfy an impartial tribunal, the judgment of dismissal, based on that charge alone, would have to stand. Where the question of guilt is dependent on the resolution of conflicting questions of fact, and clearly established *animus* or prejudice may have determined or probably did control which way the conflict should be or was solved, the court, in the furtherance of justice, would be compelled to set the finding aside. But that question can only be determined on the whole record, and its examination here would be premature. I could act only on the papers before me which do not include the record of the trial. These papers contain the decision or opinion of the commissioner, filed simultaneously with the order of dismissal. This opinion professes to find the relator guilty on several of the charges on uncontradicted testimony,—largely on that given by himself. If the record bears this out, the

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sentence must stand, however biased the respondent may have been or however undignified or unjudicial his conduct of the trial may have been, or however violative of propriety or delicacy it may have been to have insisted on his right to preside in person.

I must, therefore, reject also bias and prejudice as a proper ground for a stay. Consequently nothing remains to support it, unless a stay should issue in this class of cases as a matter of course. So far from this being so, I am of the opinion, irrespective of the merits of this proceeding, that after hearing had in a matter of a disciplinary nature resulting in the dismissal of an inferior by a superior officer, the interests of the public service require that there should be no stay and that the dismissal should be effective until a reversal and reinstatement by the only tribunal appointed by the law to review the case. Perhaps extraordinary and exceptional circumstances may arise justifying a stay, but I am at a loss to conceive them.

I have treated this case thus far as if it were on a par with that large variety of cases that are embraced within the provisions of section 2131, and, it is insisted on behalf of the relator, that that section permits it in this case, and that the discretion in its favor having already been exercised by a judge of this court, there ought to be no interference with it. The application for the stay, however, was made *ex parte,* the respondent had no opportunity to present his objections to it and it is settled that, under these circumstances, especially where it appears after hearing both sides that the stay was improvidently granted, it may properly be vacated on motion. 4 Ency. of Pl. & Pr. 211, 235, and cases cited.

So far as section 2131 is concerned a proper understanding will show, I believe, that the right to a stay has, if anything, been limited rather than extended and that contemporaneous with the increase in the kind and number of determinations reviewable by certiorari, there has been a restriction in the application of the stay. It will be observed that the language of the section is negative. "Except as prescribed in this section, a writ of certiorari does not stay the execution of the determination to be reviewed, or affect the power of the body or officer, to which or to whom it is addressed. The court, which grants the writ, may, in its discretion, and upon such terms, as to security or otherwise, as justice requires, direct, by a clause in the writ, or by a separate order, that

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the execution of the determination be stayed, pending the certiorari, and until the further direction of the court."

The negative form of this provision, that the "writ of certiorari does not stay the execution of the determination to be reviewed," was adopted to limit a right existing at the common law. A common-law certiorari carried with it a stay as a matter of course, or rather it was unnecessary to secure a separate stay as that was involved in the writ itself which literally removed the record out of the inferior tribunal and thus rendered all proceedings on it there impossible in theory of law and erroneous in practice. Bac. Abr. Certiorari, Tit. G.; Patchen v. Mayor, 13 Wend. 664. The record being removed, it followed as a necessity of logic, that there was nothing left below to act upon.

In the application of common-law principles, to the particular facts of each case, some confusion resulted in the decisions of this State. To remedy that confusion section 2131 was enacted. Mr. Throop, in his annotation to that section, says that "the question whether a certiorari operates *per se* as a stay, was, when the Code was enacted, still surrounded with much obscurity." And he cites in support of this view: Blanchard v. Myers, 9 Johns. 66; Ex parte Sanders, 4 Cow. 544; Patchen v. Mayor, 13 Wend. 664; Payfer v. Bissell, 3 Hill, 239; Conover's case, 5 Abb. Pr. 182; S. C., 25 Barb. 429.

The Code removed the obscurity and thus settled the practice for this State. It broke away from the common-law principle and declared that the writ did not act as a stay except where specifically authorized by the court. The whole question was, therefore, left open to be passed upon as each class of cases, or as each individual case of a proper class arose. This section, therefore, so far from being a new enactment, granting a new right and enlarging the field of the stay, in effect limited it.

I have been referred to no case, nor has my own research been able to disclose one, where a stay has issued in a case like the present. I am not surprised at this result, and it is quite in harmony with my own views. Irrespective of the merits of this particular proceeding I should deem it a dangerous principle and a bad precedent to invoke the extraordinary remedy of a stay in what is, in its last analysis, simply a disciplinary proceeding which has resulted in the dismissal of an inferior by a superior officer. The interests of the public, the efficiency within the de-

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partment itself, the respect for authority and superiority which is the condition precedent to effective work, and, especially in this case, the harmony of relationship and the indispensable co-operation that should exist between the head of the department and its chief, so that the best results may be achieved — all require that there shall at this intermediate stage be no interference with the course events have taken. Upon a reinstatement by the Appellate Division, should that tribunal so decide, the relator will be restored to duty and receive the pay for the time he was ousted. But until that decision, I am compelled to assume that the dismissal was regular and supported by evidence. At the same time I wish again to reiterate that my conclusion in nowise involves the merits of this proceeding, and is in no sense intended to affirm the proceedings at the trial of the relator. For the reasons stated I am of the opinion that the stay should be vacated.

Stay vacated.

Matter of the Application of ALBERT C. WIEGAND, for a Peremptory Writ of Mandamus against JACOB A. CANTOR, as President of the Borough of Manhattan, City of New York.

(Supreme Court, New York Special Term, December, 1902.)

Civil service — Status of the cashier of the commissioner of public works of the city of New York.

A cashier, of the commissioner of public works of the city of New York, who issues permits to open streets, receives money for them, enters the moneys and accounts for them weekly to the city chamberlain, receives, enters, and accounts for moneys deposited as special security against damage to sidewalk pavements, and receives from other bureaus in the department of highways, and accounts for, all moneys paid them, is not a "regular clerk", within L. 1897, ch. 378, § 1543, as amended by L. 1901, ch. 466, but holds a confidential position, and therefore may be discharged therefrom summarily and especially where his position is classified in the non-competitive list.

APPLICATION for a peremptory writ of mandamus.

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Thomas J. Curran, for petitioner.

George L. Rives, Corporation Counsel, for defendant.

LEVENTRITT, J. The relator seeks by mandamus reinstatement to the position of cashier in the office of the commissioner of public works. Both at the time of his appointment and removal his position was classified in the noncompetitive list and ranked as confidential. He was removed without any charges being preferred or hearing had and his application is based upon the contention that this was in violation of section 1543 of the Greater New York charter as amended, chapter 466, Laws of 1901. While the classification by the civil service commission is not controlling, it indicates the conclusion reached by the board whose duty it is to classify positions in the municipal civil service. Their conclusion that relator's position was confidential is fortified by his own recital of his duties. He summarizes them as follows:

"1. To issue permits to open streets for repairs to water and sewer pipes or to make connections with water mains and sewers; to receive moneys paid for such permits.

"2. To enter the amounts received for issuing the aforesaid permits in books provided for that purpose; to keep a correct and true account of the moneys so received and to transmit weekly to the city chamberlain sworn statements or returns of the amounts so received as well as the said moneys.

"3. To receive all moneys deposited as special security against damage to sidewalk pavements, giving receipts therefor; making weekly returns thereof to the comptroller of the city of New York and taking his receipt therefor.

"4. To enter amounts received for such special security deposits in books provided for that purpose and keep correct account of same.

"5. To receive from the other bureaus in the department of highways all moneys paid to them and to give receipts therefor; to make a summary of all moneys received each week for the special, general and sinking funds and the special security deposits and to render quarterly, semi-annual and annual reports of all moneys received, and the respective funds to which they had been credited."

Herefrom the relator erroneously concludes that his position

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was not confidential, but that of a "regular clerk," and within the protection of section 1543, which forbade the removal of a regular clerk without an opportunity of making an explanation. On his own showing the relator's position is one requiring the trust and confidence of the appointing officer. His duties were not of a mere clerical nature and the classification made by the civil service commission is, in my opinion, in full accord with the authorities. Matter of Shaughnessy v. Fornes, 73 App. Div. 462; affd., 172 N. Y. 323; People ex rel. Crummey v. Palmer, 152 id. 217; People ex rel. Sears v. Tobey, 153 id. 381; Matter of Ostrander, 12 Misc. Rep. 476; affd., 146 N. Y. 404. As the relator's papers fail to establish that he is entitled to relief, an alternative writ issued thereon would be unavailing.

Motion denied.

THE PEOPLE ex rel. JESSE LEWISOHN, Relator, *v.* WILLIAM E. WYATT, a Justice, Etc., Respondent.

THE SAME, Relator, *v.* WILLIAM J. O'BRIEN, as Sheriff et al., Respondents.

(Supreme Court, New York Special Term, December, 1902.)

Crimes — Gambling — The information — Exclusion of the public from the investigation — A witness must answer a proper question although it may tend to convict him.

An information wherein the district attorney of the county of New York alleges upon information and belief that, in the city and county of New York on Jan. 1, 1901, and thereafter continuously until Dec. 1, 1901, one Richard A. Canfield did at said city, in premises described by their street number, use and allow to be used certain rooms for the purpose of gambling, is sufficient under Code Crim. Pro., § 148, to confer upon a magistrate of the said city jurisdiction to inquire into the charge and subpœna and examine witnesses, and he may also exclude the public from the investigation.

A witness who refuses to answer a proper question at such an investigation relative to gambling is guilty of a misdemeanor, under Penal Code, § 143.

Assuming that a question put him — whether he had ever been in the said premises — if answered, might afford the prosecutor some

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facilities for fastening the crime of gambling upon him, the witness must answer, as the indemnity afforded him by Penal Code § 342 meets and overcomes the protection of the State constitutional provision (art. I, § 6) that no person shall be compelled in any criminal case to be a witness against himself.

The proceeding being taken under the law of the State of New York and before a magistrate of this State, the witness cannot claim absolute immunity or any immunity under the different and broader rule in the Federal courts, in regard to the privilege of a witness, as declared upon a construction of the fifth amendment to the Constitution of the United States — identical in phraseology with the said provision of our State Constitution — and this because the first ten of those amendments do not restrict the powers of a State, and the scope of the fifth amendment was not enlarged by that part of the fourteenth amendment which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, etc.

PROCEEDINGS by writs of certiorari and habeas corpus to review the action of respondent Wyatt, a justice of the Special Sessions, in issuing a warrant for the arrest of relator upon information charging him with a misdemeanor.

Hoadly, Lauterbach & Johnson (Alfred Lauterbach, of counsel), for relator.

William Travis Jerome, District Attorney, for respondents.

SCOTT, J. The relator, by writs of certiorari and habeas corpus, seeks to review the action of the respondent Wyatt, a justice of the Special Sessions, in issuing a warrant for his arrest upon an information charging him with a misdemeanor, in that he unlawfully refused to answer a question put to him upon a criminal proceeding pending before said justice. The questions raised upon the return to the writs have been elaborately argued. It was stated upon the argument both in behalf of the district attorney and by counsel for the relator that it was deemed that the questions thus argued were of such importance that it was desirable that the opinion of the appellate courts should be obtained thereon as

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speedily as possible. I shall not, therefore, attempt to discuss any of the numerous questions at any considerable length, but shall content myself with stating as briefly as possible the conclusions at which I have arrived. The proceeding in the course of which the relator refused to answer was an investigation conducted by the respondent Wyatt sitting as a magistrate upon a sworn information presented to him by the district attorney of this county. In that information the district attorney alleged, upon information and belief, that in the city of New York, in the county of New York, on the first day of January, 1901, and thereafter continuously until the first day of December, 1902, one Richard A. Canfield did, at the city of New York in the premises known as No. 5 East Forty-fourth street in the borough of Manhattan, use certain rooms and allow them to be used for the purposes of gambling. The relator insists at the outset that this information is not sufficient to invest the magistrate with jurisdiction to proceed with an investigation into the truth of the allegations, resting this contention upon People ex rel. Laird v. Hannah, 92 Hun, 476; 37 N. Y. Supp. 703. The information which was condemned in that case, was quite different from that in the case at bar. Section 145, Code of Criminal Procedure defines an information as an "allegation made to a magistrate that a person has been guilty of a designated crime." The defect found in the information in the case cited by the relator, was that it did not charge any person or designate any crime, or state, even approximately, the time and place when any crime was committed. The present information names the person accused, designates the crime of which he is accused and the place where such crime is said to have been committed, and the dates between which the accused is said to have continuously committed the criminal act. The information upon which the respondent Wyatt acted was sufficient to confer jurisdiction upon him to examine witnesses under section 148, Code of Criminal Procedure. Blodgett v. Race, 18 Hun, 132; People v. Hicks, 15 Barb. 154. It is further objected that the magistrate was without authority to exclude the public from his inquiry into the truth of the allegations contained in the information. This precise question was raised and decided adversely to the relator's present contention in People ex rel. Kenney v. Cornell, 6 Misc. Rep. 568. I see no reason to question either the authority or the reasoning of this decision. The relator argues with much ingenu-

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ity that a refusal to testify before a committing magistrate is not punishable by indictment under section 143, Penal Code. That section provides that a person who commits a contempt of court of any one of several kinds, is guilty of a misdemeanor. Among the acts specified by this section as contempts is "contumacious and unlawful refusal to be sworn as a witness, or after being sworn, to answer any legal and proper interrogatory." Subd. 6. Section 148 of the Code of Criminal Procedure requires a magistrate, before whom an information is laid, to examine the witnesses produced by the prosecutor, and section 608 of the same Code authorizes him to issue subpœnas for such witnesses. If then the information laid before the respondent Wyatt was sufficient to invest him with jurisdiction to inquire whether the crime alleged had really been committed, he had jurisdiction to issue a subpœna for the relator, and to require him to be sworn as a witness, and to answer such proper questions as were put to him, and for a refusal so to answer the relator was guilty of a misdemeanor. It does not matter whether or not, under section 609 of the Code of Criminal Procedure he might also be proceeded against under section 856 of the Code of Civil Procedure for it is expressly declared by section 680 of the Penal Code that a criminal act is none the less punishable as a crime, because it is also declared to be punishable as a contempt of court. It remains to be considered whether the relator was justified in declining to answer the question that was put to him. As has been said the information in effect charges one Canfield, with keeping a gambling-house at No. 5 East Forty-fourth street. The relator having testified that he knew Canfield was asked, and refused to answer, the question whether he had ever been in the premises said to have been occupied as a gambling-house. His refusal to answer was distinctly placed upon the ground that to answer the question might tend to criminate him. The provisions of the Penal Code respecting gambling are very stringent and make it a crime under certain circumstances, for any person to participate in a gambling game. It was assumed on the argument, and may be accepted as true for the purposes of this decision, that while to answer the question would not of itself require the relator to confess to a crime, yet that his answer might afford the prosecutor some facilities for fastening the crime of gambling upon him, supplying, perhaps, the necessary link in the chain of evidence required to convict him.

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The provision of law under which the relator undertakes to defend his refusal to testify is found in section 6 of article I of the Constitution of this State, which provides that no person "shall be compelled in any criminal case to be a witness against himself." There are certain crimes, of which gambling is one, which are usually committed under such safeguards of secrecy and precaution that it is difficult for a prosecuting officer to obtain evidence concerning them unless he can compel those who have participated in the offense to testify thereto. To meet this difficulty section 342 of the Penal Code provides that "No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter, (relating to gambling) upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding." It is urged that the immunity offered by the statute is only partial; that though the witness' own testimony cannot afterward be used against him, he may, nevertheless, be compelled to disclose matter which will lead to his prosecution, or to reveal the existence of evidence, other than his own testimony, which may secure his conviction. This objection was raised and directly passed upon by the Court of Appeals of this State in People ex rel. Hackley v. Kelly, 24 N. Y. 74, and was overruled. In that case the same constitutional provision was invoked by the relator, and he was met by a similar statute of indemnity. In an opinion by Judge Denio, concurred in by all the members of the court, it was said: "It is no doubt true that a precise account of the circumstances of a given crime would afford a prosecutor some facilities for fastening the guilt upon the actual offender, though he were not permitted to prove such account upon the trial. The possession of the circumstances might point out to him sources of evidence which he would otherwise be ignorant of, and in this way the witness might be prejudiced. But neither the law nor the Constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law." This case was cited and accepted as a true exposition of the law as late as 1887, in

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People v. Sharp, 107 N. Y. 427. It stands, therefore, as the law of this State, as declared by its highest appellate tribunal, that such indemnity as is extended to a witness by section 342 of the Penal Code meets and overcomes the privilege or protection afforded him by the Constitution. I am not unmindful of the fact that in a later case (People ex rel. Taylor v. Forbes, 143 N. Y. 219), there are expressions in the opinion which seem to indicate that the court was disposed to accept the broader rule now established in the Federal courts, but there was no question in that case of any statute of indemnity, and, therefore, the question raised in this proceeding was not presented. I, therefore, find myself constrained to follow the rule, still unreversed and unmodified, which was declared by the Court of Appeals in the Hackley Case, *supra*. It was conceded upon the argument and cannot be doubted that the rule in the Federal courts is much more liberal to a witness. The phraseology of the Federal Constitution is the same as that of the Constitution of this State. Respecting that provision the Supreme Court of the United States has held that no statute defeats the privilege to a witness of refusing to testify unless it affords absolute immunity against future prosecution for the offense to which the question relates. Counselman v. Hitchcock, 142 U. S. 547. The reasoning by which the court arrives at this conclusion is very persuasive, but as it is in direct conflict with the law of this State, as declared by the Court of Appeals, it is not controlling upon this court unless the relator is entitled to take refuge behind the Federal Constitution as well as our own. The claim exempting a witness from furnishing evidence against himself is to be found in the fifth amendment to the Federal Constitution. It is quite well settled that the first ten amendments to the Constitution contained no restrictions upon the powers of the State, but were intended to operate solely on the Federal government. Brown v. New Jersey, 175 U. S. 174. The relator, therefore, can claim no immunity under the Federal Constitution unless the fifth amendment has been so extended in the scope of its operation as to cover the case of a witness called to answer before a State magistrate pursuing an inquiry under a State law. It is contended that such has been the effect of the fourteenth amendment to the Federal Constitution, which provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

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deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is urged by the relator, as it has frequently been urged by others, that this amendment has operated to render the provisions of the first ten amendments applicable to the several States, because these latter confer certain privileges and immunities upon citizens of the United States, which by the fourteenth amendment the States are prohibited from abridging. This contention has frequently been made before the Supreme Court of the United States, but has never met with the assent of that court. On the contrary, the general trend of the decisions of the court is rather to negative any such proposition. Hurtado v. California, 110 U. S. 516; Maxwell v. Dow, 176 id. 581; Missouri v. Lewis, 101 id. 31; Matter of Kemmler, 136 id. 448. My conclusions, therefore, are that the information laid before the respondent Wyatt was sufficient to invest him with jurisdiction to inquire into the truth of its allegation; that having acquired jurisdiction he had power to exclude the public from the inquiry, to subpœna the relator and require him to be sworn and to testify; that while the question put to the relator and which he refused to answer might tend to criminate him within the meaning of the Constitution, but for section 342 of the Penal Code, yet that that section furnished him all the immunity which the Constitution requires; that the question was, therefore, one which should have been answered, and that relator's refusal to answer was contumacious and unlawful, and such as is declared by section 143 of the Penal Code to be a misdemeanor, and finally, that the relator cannot excuse his refusal to answer by invoking the fifth amendment to the Federal Constitution. The result is that the writs must be dismissed and the relator remanded.

Writs dismissed and relator remanded.

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THE PEOPLE ex rel. THE EDISON ELECTRIC ILLUMINATING COMPANY OF BROOKLYN, Relator, v. THOMAS L. FEITNER et al., Commissioners of Taxes, Etc., Respondents.

(Supreme Court, New York Special Term, December, 1902.)

Tax — Certiorari to review — Objections to an assessment, how waived or lost — Insufficient statement of overvaluation — Reference denied.

Where a corporation, claiming to be aggrieved by the assessment of its real estate located in the city of New York, applies in writing to the tax commissioners for its reduction (L. 1897, ch. 378, § 895) and does not, in its application, sufficiently allege inequality as a ground of relief and does not allege it at all in its subsequent petition under the Tax Law (L. 1896, ch. 908) for a writ of certiorari to review the assessment, the objection as to inequality is waived.

A writ of certiorari brings up for review only such objections as were made before the tax commissioners and consequently the petition for the writ cannot expand the objections.

A statement, in such an application, that the relator and applicant's real estate has been assessed at a valuation of $905,000 "whereas the same should not have been, in its judgment, valued at more than $500,000 to be * * * in accordance with the fair marketable value thereof", does not allege overvaluation as a fact, and is a mere opinion, presumably of an officer of the corporation, not shown to be qualified as an expert, in regard to overvaluation.

Therefore, it is insufficient to justify the court in concluding that, within section 253 of the Tax Law, "testimony is necessary for the proper disposition of the matter" and a motion for a reference must be denied.

Allegations as to the deterioration of the real estate (an underground conduit system) held insufficient to show that there had been an overvaluation.

APPLICATION to review by certiorari the assessment as real estate, for the purposes of taxation, of the relator's underground conduit system. Motion for a reference.

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Sheehan & Collin (John L. Wells, of counsel), for relator.

George L. Rives, Corporation Counsel (George S. Coleman and Curtis A. Peters, of counsel), for respondents.

SCOTT, J. This is an application to review by certiorari the assessment as real estate, for the purposes of taxation, of the relator's underground conduit system. The relator moves for a reference to take testimony, and the respondents move to dismiss the writ. The relator, as required by the charter, made written application to the respondents for a reduction of the assessment. That application undertook to allege that the assessment was illegal, both on account of over-valuation and inequality. The allegation as to inequality was not stated in the application in such form as to constitute a basis for action by the commissioners, and in its petition for the writ of certiorari the relator makes no claim of inequality. That objection to the assessment is, therefore, to be deemed waived. People ex rel. Western Union Tel. Co. v. Tierney, 57 Hun, 357. This leaves to be considered only the allegation as to over-valuation. Under section 895 of the Greater New York charter of 1897, which was in force when this assessment was made, a person feeling aggrieved by the assessed valuation of his real estate was required to make an application for the correction of the assessment in writing stating the ground of objection thereto. The writ of certiorari is essentially a writ of review and its function in matters of taxation is to review the action or refusal to act of the tax commissioners. Consequently no objections are brought up for review, except such as were presented to the commissioners upon the application for correction. Matter of Winegard, 78 Hun, 58; People ex rel. N. Y. & N. J. Tel. Co. v. Neff, 15 App. Div. 8. The objection to the assessment cannot, therefore, be expanded by the petition for the writ. In the present case the application to the commissioners is attached to the petition and by reference made a part of it. The question presented by the motion and countermotion is whether or not the objection made to the assessment as contained in the application for correction addressed to the commissioners, is sufficient to call for the taking of evidence. Under section 253 of the General Tax Law the granting of an application to take evidence is not a matter

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addressed to the discretion of the court, but is a substantial right if issues of fact are raised by the petition and the return, the issuable allegations of the petition being those which were contained in the application to the commissioners. People ex rel. Thomson v. Feitner, 168 N. Y. 441, 457. If it should appear that the facts stated in the application for correction, if taken as true, are not sufficient to establish the over-valuation no issue is presented requiring evidence to be taken, although the commissioners in their return may, for greater caution, have undertaken to answer or deny some or all of the allegations, since the denial of an immaterial allegation cannot raise an issue which must be tried. What is a sufficient allegation of over-valuation to raise a question requiring the taking of evidence has been much discussed. In People ex rel. Broadway Improvement Co. v. Barker, 14 App. Div. 412, the allegation was positively made that the property was assessed at $210,000 more than was in accordance with the marketable value thereof. This was held to be equivalent to an allegation that the assessment was $210,000 in excess of the price at which the property would ordinarily sell, and was accordingly considered a sufficient allegation of over-valuation. In People ex rel. Bronx Gas Co. v. Feitner, 43 App. Div. 198, the allegation was that the property was assessed at $89,000, instead of $14,644, which was the full value, and at more than it would sell for under ordinary circumstances, and this allegation was deemed sufficient. In People ex rel. Sutphen v. Feitner, 45 App. Div. 542, the relator used the precise language used by the relator in the present case, alleging that his property had been assessed at $145,000, whereas the same should not have been, in his judgment, valued at more than $69,000 to be in accordance with the market value thereof. He then alleged that the property had not increased in market value since 1895, and had been assessed in 1895 at $57,000, being increased to $69,000 in 1896, but he did not show that the property in those years had been assessed at its true market value. These allegations were held to be insufficient to raise any issue of fact, since the relator had merely made a claim of over-valuation and had stated no facts upon which the claim was based. From these cases the rule may be deduced that in order to warrant the taking of evidence the applicant must state facts from which, if taken to be true, it can be seen that the property has been over-

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valued. Since the petition and return in a tax certiorari are construed and treated as the pleadings in an action, the relator may either allege the over-valuation as a matter of fact, as was done in Broadway Improvement Co. v. Barker, *supra,* and in People ex rel. Bronx Gas Co. v. Feitner, *supra,* or may set forth a claim of over-valuation supported by the averment of particular facts to sustain the claim as was done in People ex rel. Thomson v. Feitner, *supra.* In the present case the relator's application was as follows: "It finds that the same (its real estate) has been assessed on the assessment-roll of 1899 at a valuation of $905,000, whereas the same should not have been, in its judgment, valued at more than $500,000 to be * * * in accordance with the fair marketable value thereof." This, as will be seen, is the precise language which was held to be insufficient in People ex rel. Sutphen v. Feitner, *supra.* It does not allege over-valuation as a fact, but merely states that in the opinion of relator, meaning, no doubt, the opinion of the officer who signed the application, the property is assessed beyond its marketable value. It is a mere expression of opinion and not a statement of fact, and is not even evidence of the fact because it nowhere appears that the person expressing the opinion is qualified to do so. The application then went on to state certain facts, intended, no doubt, to support the claim of over-valuation, but which are insufficient to do so. It stated that the entire system had been deteriorated and damaged by the action of stray electric currents, causing electrolysis, but it did not state what had been the value of the system before it had been damaged, or how much the damage had been. *Non constat* but that even in its damaged and deteriorated condition the system might be worth all it had been valued at. The relator further alleged that much of its system had been in the ground for many years and was worth but a part of its original value and at the present cost price of similar material is much less than it was when said system was put in. But there was no statement as to how much of the system had been in the ground for many years, or what its original value was, or what part of its original value had remained, or what was the cost of the material when the system was put in, or how much less the cost of similar material is now. So that, if all the facts alleged in support of the relator's claim or opinion of over-valuation were to be taken as true, there would still be nothing upon which to base a presumption that the valuation fixed by the respondents was

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excessive, for notwithstanding all the deterioration in value claimed the property might well be worth what it is assessed at.

The motion for a reference must be denied, and the writ dismissed, with costs.

Motion denied and writ dismissed, with costs.

THE PEOPLE ex rel. THE CORD MEYER COMPANY, Relator, *v.* THOMAS L. FEITNER et al., Commissioners of Taxes, Etc., Respondents.

(Supreme Court, New York Special Term, December, 1902.)

Tax — Certiorari to review — Reference, when ordered — Capital stock, how assessed — Valuation of realty not to be increased by the aggrieved party on review.

The court will order a reference (L. 1896, ch. 908, § 253) to take testimony in a proceeding to review an assessment by certiorari only where the application for a reduction tenders a question of fact and contains a statement of fact which, if taken as true, would require a reduction or cancellation of the assessment.

The taxable value of the capital stock of a corporation is to be ascertained by adding together the actual value of its realty and its personalty and deducting therefrom its debts and the assessed value of its realty.

Where the first two items amounted to $506,847, the debts to $55,000, and the assessed value of the real estate of the corporation was given by it in a preliminary written statement to the tax commissioners as "over $400,000", the court approved an assessment of the capital stock at $51,800 — its actual value not being stated nor whether it was worth less than par.

Where a corporation has thus declared the assessed value of its real estate to be "over $400,000" and has never claimed to the tax commissioners any other value, its statement of value must be regarded as approximately true, and therefore no consideration should be given to a subsequent value of $460,000 first alleged in a petition for a certiorari to review the assessment.

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PROCEEDING by relator to obtain a cancellation of the assessment of its capital stock.

Sheehan & Collin (John L. Wells, of counsel), for relator.

George L. Rives, Corporation Counsel (George S. Coleman and Curtis A. Peters, of counsel), for respondents.

SCOTT, J. The relator seeks by this proceeding to obtain a cancellation of the assessment of its capital stock. The assessment was first placed at $500,000, but upon an application to the commissioners it was reduced to $51,800. The relator being still dissatisfied brings this proceeding. The property of the relator consists of both real and personal property, and the rule for ascertaining the taxable value of the capital stock is well established and is conceded by the relator. That value is to be ascertained by adding together the actual value of its real estate and personal property and deducting therefrom the sum of its indebtedness and the assessed value of its real estate. People ex rel. Equitable Gas Light Co. v. Barker, 144 N. Y. 94. The question as to whether or not the commissioners have erred in making the assessment is to be determined primarily by the preliminary statement made to the commissioners to enable them to fix the assessment and by the facts set forth in the application for a reduction. The court sits, not in the place of the taxing officers, but in review of their action, and for this reason can act only upon the case as presented to the commissioners, and not upon some new claim, or new statement of facts contained in the petition for the writ of certiorari. It is to be presumed, and the law will presume that in the preliminary statement and in the application for reduction the relator stated the case as favorably for itself as an adherence to the exact facts of the case will permit. It will also be presumed that when it makes its preliminary statement and application for reduction it actually knows its own financial condition. Section 253 of the Tax Law (L. 1896, ch. 908), providing for taking evidence in certiorari proceedings, does not require that such evidence shall be taken in every proceeding, but only where the application for a reduction of the assessment tenders a question of fact, and contains a statement of fact, which, if taken as true, would require a reduction or cancellation

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of the assessment. If upon the admitted facts as shown by the preliminary statement and the application for reduction, it clearly appears that the assessment of the capital stock was not excessive, there is no occasion for taking evidence. In the preliminary statement the relator stated that its total gross assets, including real estate, were $506,847.01, and that of this total the real estate amounted to $500,000 and its personal property $6,847.01. It further stated that the real estate had been paid for in stock and that the actual value at which such real estate is carried on the books of the corporation as an asset was $500,000. It omitted to state the actual value of the capital stock, or whether it was worth less than par. In its application for a reduction of the assessment it made no reference to or claim respecting the actual value of its real estate. The commissioners were, therefore, clearly justified, in considering the application for a reduction of the assessment, to take the real estate as of the actual value of $500,000, and there is nothing in either the preliminary statement or the application for reduction to suggest any question as to this valuation, or to call for the taking of evidence relating thereto. No question is made as to the value of the personal property. In stating the assessed value of its real estate the relator was singularly disingenuous. The blank furnished by the respondents upon which the preliminary statement was made asked for the assessed value of the real estate and requested that it be described by ward and ward map numbers. The statement made in response to this question was, "Not all the real estate of the company is located in New York city. It has several hundred parcels in various boroughs which have been assessed at over $400,000." In its application for a reduction of the assessment it made no reference to, or claim respecting, the assessed value of its real estate, and by refusing to give any particulars as to the location of its real estate the commissioners were precluded from ascertaining for themselves what the assessed valuation actually was. Any excess over $400,000, even one dollar, would have satisfied the statement that the assessed valuation was over $400,000. Assuming, as they had a right to assume, that the relator knew its own affairs and made as favorable a statement for itself as the truth would warrant, the commissioners were fully justified in taking the assessed value of the real estate to be but an inconsiderable sum above $400,000. There is certainly nothing in the preliminary statement or in the

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application for reduction to suggest any question as to the assessed valuation of the real estate, or to call for the taking of evidence relating thereto. In the petition for the writ of certiorari the relator seems to be still in some doubt as to what it should claim the assessed value of its real estate to be, but, as if to meet and overcome the present assessment, it states the assessed value to be over $460,000, which, as it alleges, exceeds the real value. These expanded claims are raised for the first time by the petition, and not having been incorporated into either the preliminary statement or the application for reduction, and never having been laid before the commissioners, cannot now be considered or made the basis for a reduction of the assessment in this proceeding. "The commissioners had a right to rely upon the statements made, and if they were incorrect the relator is without redress. People ex rel. German Looking Glass Co. v. Barker, 75 Hun, 6. Taking the statement presented by the relator to the commissioners it appears that the total gross assets included real estate valued at $500,000 and personal property at $6,847.01, making total gross assets of $506,847.01. Its indebtedness was $55,000, and the assessed value of its real estate "over $400,000." If that assessed value were exactly $400,000 the total deduction to be made from the gross assets would be $455,000. The taxable value of the capital stock in that case would be $51,847. It was assessed by the commissioners at $51,800, so that they apparently considered that the assessed value of the real estate might have been "over $400,000" by the sum of $47, a sum quite consistent with the statement made by the relator. It appears, therefore, that the commissioners, in finally fixing the assessment of the relator's capital stock, accepted and acted upon the relator's own statements. There is, therefore, nothing upon which to take evidence, and nothing to impeach the accuracy of the assessment.

The writ must, therefore, be dismissed, with costs.

Writ dismissed, with costs.

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THE PEOPLE ex rel. JOSEPH JACOBS, Relator, v. PETER R. McGIRR, Police Sergeant of the Fourth District Court Prison, and HENRY A. BRANN, a City Magistrate of the City of New York, Respondents.

(Supreme Court, New York Special Term, December, 1902.)

Crimes — Perjury — Proof necessary to a warrant.

A magistrate has no power to issue a warrant for the arrest of a person upon a charge of perjury where it is denied by him and the complainant's proof rests on his oath alone uncorroborated by any independent circumstances.

The testimony before the magistrate need not be convincing, but before he can issue a warrant for a crime he must have legal evidence that a crime has been committed.

CERTIORARI to inquire into the cause of relator's detention.

Parsons, Closson & McIlvaine (Austen G. Fox, of counsel), for relator.

Black, Olcott, Gruber & Bonynge (Abraham Gruber, of counsel), for respondents.

SCOTT, J. This is an application by certiorari to inquire into the cause of relator's detention. As appears by the return to the writ of habeas corpus issued simultaneously with the writ of certiorari, the immediate cause of his detention is a warrant issued by the above-named respondent, reciting that the relator has been charged with the crime of perjury, and directing that he be apprehended and brought before the magistrate to answer to the charge. In cases of such a detention the court is called upon to look into the proceedings before the magistrate to see whether the warrant is supported by legal evidence. People ex rel. Bungart v. Wells, 57 App. Div. 140; People ex rel. Fleischman v. Fox, 34 Misc. Rep. 82. The return to the writ of certiorari shows that on December 23, 1902, an information, in the form of a written complaint, was laid before the respondent charging, or purporting to charge, the relator with perjury. Section 148

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of the Code of Criminal Procedure provides that when an information is laid before a magistrate, of the commission of a crime, he must examine on oath the informant or prosecutor and any witnesses he may produce and take their depositions in writing and cause them to be subscribed by the parties making them. The respondent states in his return that he examined the complainant, and the witnesses produced by him, but since he does not attach to the return the deposition of any witness except the complainant I am forced to conclude either that his statement that he examined other witnesses than the complainant was inadvertent, or that he omitted to reduce the examination of such witnesses to writing as required by the Code. In any event, I am limited to a consideration of the evidence returned. Upon such an information and examination the magistrate is authorized to issue a warrant for the arrest of the person charged if he is satisfied that the crime complained of has been committed, and that there is reasonable ground to believe that the person charged has committed it. The function of this court in a proceeding like the present is not to pass upon the weight of the evidence before the magistrate, but to determine whether there was legal evidence before him upon which such conclusions could be founded. If there was such evidence he had jurisdiction to issue the warrant. If there was not such evidence he was without jurisdiction to do so. It is well settled in cases of perjury, where one oath is placed against another, that there must be two witnesses to prove the charge, or, in case only one witness is produced, there must be independent corroborating circumstances. The reason for the rule is obvious, for where there is nothing but one oath against another each counterbalances the other and it remains doubtful where the truth lies. In the present case there was only one oath against another. The information showed that the relator had sworn to one state of facts and the complainant swore that he thereby swore falsely. There was no supporting witness and no suggestion of corroborating circumstances. There was, therefore, not legal evidence before the magistrate that the relator had committed the crime charged. It would not, perhaps, be accurate to say that there was no evidence, because there was some, but it was partial and incomplete. It lacked the essential element of corroboration. With corroboration, either by another witness or by proven circumstances, it would have amounted to legal evidence, but without

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that corroboration it amounted to nothing. Of course, it is not intended to hold that to authorize the issuance of a warrant the complainant must produce evidence so clear and convincing as, if produced upon the trial, would suffice for a conviction, but there must be laid before the magistrate some legal evidence that a crime has been committed and that the person charged has committed it. If the evidence is clearly insufficient to establish at least the probability of either fact the magistrate was without jurisdiction to issue the warrant. Where the charge is that the person charged has committed perjury and the magistrate has before him only the oath of the complainant balanced against the oath of the person charged, there is no probability on one side or the other. To sustain the issuance of a warrant for the crime of perjury upon the unsupported oath of a single witness, as is sought to be done in the present case, might lead to interminable charges and countercharges, each successive charge furnishing the basis for a new charge against the person making it, and all the time there would be but the oath of one man against the oath of another. A very similar case to that here presented was decided by Mr. Justice LAWRENCE. The person before him had been held by a police justice upon the charge of seduction under promise of marriage, as to which the Penal Code provides that a conviction cannot be had upon the testimony of the complainant unsupported by other evidence. The return showed that, before the police justice, there had been no corroboration of the complainant. The learned and experienced justice held upon these facts that there was no legal evidence before the police justice that the crime had been committed, and discharged the prisoner. Matter of Bredenstein, Daily Reg., Mar. 26, 1886. In short, the evidence before the magistrate must be the same in kind or quality, though not necessarily the same in degree as would be required for a conviction. In the present case the evidence lacked the element of corroboration which was essential to give to it probative force. My conclusion is that the warrant was issued without legal evidence that the crime charged had been committed.

The prisoner must, therefore, be discharged.

Prisoner discharged.

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THE PEOPLE ex rel. THE NEW YORK EDISON CO., as the Successor of The Edison Electric Illuminating Co. of New York, Relator, *v.* THOMAS L. FEITNER et al., Commissioners, Etc., Respondents.

(Supreme Court, New York Special Term, December, 1902.)

Tax — Certiorari to review — Reference, when ordered — Where an assessment is void the party aggrieved is excused from making a preliminary application to "correct" it.

Where city tax commissioners assess in their "annual record", without locating them, a corporation's "foundations, sub and superstructures, conduits, pipes, wires, cables, and connections" and insist upon a right to tax them because they are located on private property, as the tax commissioners claim, and the corporation insists that the foundations, etc., are not taxable locally because, as it claims, they are located in or under highways and taxable only as special franchises and as such only by the State board of tax commissioners, a question of fact is presented which requires evidence to be taken for its determination and therefore a reference will be ordered to that end.

The statutory rule that a party aggrieved by an assessment cannot review it by certiorari unless the party has timely applied to the proper officers to have it "corrected" does not apply where it is void because the tax officials had no right to make it.

CERTIORARI to review an assessment of relator's property for the purposes of taxation.

Beardsley & Hemmens, for relator.

George L. Rives, Corporation Counsel (E. Crosby Kindleberger, of counsel), for respondents.

SCOTT, J. This is the usual tax certiorari to review the assessment of relator's property for purposes of taxation. The Edison Electric Illuminating Company of New York, predecessor of the relator, was assessed for the year 1901 at $1,664,850, value of its capital stock, and $80,000, value of its real estate. The cer-

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tiorari calls in question both assessments. The entry respecting the valuation of the real estate, as it appears in the "annual record" for the year 1901, shows that the subject-matter assessed was "foundations, sub and superstructures, conduits, pipes, wires, cables, and connections." Where these were situated does not appear in the record. The relator insists that the property thus assessed as real estate must be deemed to be the conduits, cables, etc., in or under the public streets and highways, and that they are exempt from assessment and taxation for local purposes under the Franchise Tax Law, which provides that "tangible property subject to a special franchise tax situated in, upon, under or above any street, highway, public place or public waters as described in subdivision three of section two shall not be taxable except upon the assessment made as herein provided by the state board of tax commissioners." Laws of 1899, chap. 712, § 47. The respondents, on the other hand, assert that the real estate thus assessed consisted of conduits, cables, etc., in, upon, under or affixed to the land on private property, and hence was not exempted from local assessment under the section of the Franchise Tax Law above quoted. Manifestly here is a question of fact requiring the taking of evidence for its determination. The respondents, however, insist that as to the assessment of the real estate the writ should be quashed, because the relator made no application to the tax commissioners for the correction of the assessment. Section 895 of the charter of the city of New York provides that: "During the time that books shall be open to public inspection as aforesaid application may be made by any person or corporation claiming to be aggrieved by the assessed valuation of real or personal estate, to have the same corrected. If such application be made in relation to the assessed valuation of real estate, it must be made in writing, stating the grounds of objection thereto," and section 250 of the General Tax Law provides that petitions for the writ of certiorari shall show "that application has been made in due time to the proper officers to correct such assessment." It is well settled that the court will not entertain applications to correct assessments unless application has first been made to the commissioners. People ex rel. Sutphen v. Feitner, 45 App. Div. 542. Such an application, however, presupposes that the commissioners have jurisdiction to make the assessment in the first place, and that they have acted erroneously

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in exercising that jurisdiction, and that their assessment is, therefore, open to correction by them. When, however, the assessment is absolutely void, because the commissioners have no jurisdiction to make the assessment at all, there is nothing to correct, and it is not necessary that any application should be made to the commissioners as a foundation for the writ of certiorari. People ex rel. American Thread Co. v. Feitner, 30 Misc. Rep. 641. That is the case presented here on the relator's statement of the facts. If the conduits, cables, etc., assessed as real estate were situated as is alleged by the relator, they are wholly exempt from local taxation, and the commissioners were without jurisdiction to assess them at all. If, upon the evidence to be taken, it appears that the real estate assessed consists exclusively of property exempted from local taxation by the Franchise Tax Law the assessment must, of course, be vacated. If, however, it should appear that the relator does own real estate consisting of conduits, cables, etc., wholly upon private property and not, therefore, exempted by the Franchise Tax Law, the assessment must stand and cannot even be reduced, however much its value may have been overestimated by the commissioners, for as to such property the commissioners had jurisdiction to fix an assessment, and their decision as to its value cannot be reviewed because no application for a correction of the assessment was made to them. The necessity for a prior application to the commissioners failed only as to property absolutely exempt from assessment, as to which they were consequently without jurisdiction. The motion to quash must, therefore, be denied. As to the assessment upon the capital stock, the relator duly made application for its correction and the commissioners did largely reduce it. In that application certain statements were made which, as the commissioners state in their return, they disbelieved and disregarded. Their action in so doing was equivalent to a denial of the statements thus disregarded. Hence arises an issue of fact upon which evidence should be taken. An order of reference may be presented and settled on notice.

Ordered accordingly.

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Matter of the Estate of COLLIS P. HUNTINGTON, Deceased.

(Surrogate's Court, New York County, December, 1902.)

Surrogate's Court — Who may compel an inventory — Lack of jurisdiction as to a disputed claim.

Only a creditor of, or a person interested in, the estate of a decedent can compel his executors to file an inventory.

A person who alleges that he is a stockholder in a corporation out of which the testator as officer and director improperly made large profits — for which the applicant has sued in its behalf because the corporation would not sue — is not a creditor of the estate nor interested in it and therefore cannot compel the executors of it to file an inventory.

Semble, that there is no general power, apart from the statute, in the surrogate to order an inventory to be filed and that if he has any discretion in the matter it should not be exercised to order one where the claim upon which the application rests is disputed and unproved.

The surrogate cannot try and determine a disputed claim.

APPLICATION for an order requiring the executors of testator to file an inventory of his estate.

Robert L. Cutting, for petitioner.

Maxwell Evarts, for executors.

THOMAS, S. The petitioner seeks to obtain an order requiring the executors of the testator to file an inventory of his estate. In the petition he alleges that he "has a large claim against the estate which he is diligently prosecuting," but no other particulars of his claim are set forth. In the affidavit upon which his order to show cause is based he sets forth the grounds of his claim and cause of action to be as follows:

The petitioner is, and since 1894 has been, a stockholder of the Central Pacific Railroad Company. He says that "during the years 1865, or thereabout, to 1898, or thereabout," the testator was an officer and director of said company, and that he, together with

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Leland Stanford, Charles Crocker, Mark Hopkins, and others, controlled its business and corporate acts; and that he and his associates were also interested, during those years, in the Contract and Finance Company and the Pacific Improvement Company. On behalf of the Central Pacific Railroad Company the testator and his associates entered into contracts with themselves, acting under cover of the said companies, for the construction and equipment of the Central Pacific Railroad, and the said construction companies profited by said contracts to the extent of $125,000,000. On these facts the petitioner has made demand on the board of directors of the Central Pacific Railroad Company to bring suit against the estate of the testator for an accounting and for a decree that the executors of said estate pay over "to the Central Pacific Railroad Company" such sum as shall be found due on said accounting. No such action having been brought by the company, the petitioner has commenced an action for the same relief, which is now pending in the Supreme Court.

If all of these facts are true, and if they are sufficiently stated, and if the action in the Supreme Court shall end in a decree awarding the relief the petitioner seeks, the petitioner is not and will not become a creditor of the estate of the testator. The creditor is the Central Pacific Railroad Company; the only decree that the Supreme Court is asked to make is that payment be made to it; it, and not the petitioner, can alone release the claim, and the circumstance that the rules of equity as administered in the Supreme Court permit the petitioner, in an action in which it is made a party, to assert and litigate its claim, does not have the effect of making the petitioner the owner of the claim or the creditor. In Pendle v. Waite, 3 Dem. 261, it was alleged that the petitioner was a partner of a son of the decedent; that his partner, without his knowledge or consent, paid $10,000 out of the assets of the firm to the decedent, when the actual debt to him did not exceed $100; that this payment was fraudulent and void as to him and the firm creditors, and that "the said firm or its legal representatives" had a valid claim against the estate for said sum of $10,000. It was held by Rollins, S., that these facts did not make the petitioner a creditor, so as to entitle him to an order requiring the executor to file an inventory, and it was said that "it is not enough for him to aver that some person other than himself is a creditor, even though the allegation to that effect is undisputed." The defi-

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nition of the word "creditor" in section 2514 of the Code of Civil Procedure is not entirely full, but it does not aid the petitioner. He is not a "person having such a claim or demand," since his claim is subordinate to that of the corporation. The principle that would extend the rights of a creditor to him would also include a person having a power of attorney from the creditor, limited to the commencement of an action in the Supreme Court, in his name, and for a specially defined form of relief.

The petitioner's claim is disputed and denied. I am without jurisdiction to try and determine the issues raised, or to adjudge the petitioner to be a creditor of the estate of the testator, even if his allegations, uncontradicted, would make him a creditor. I am, therefore, precluded from awarding him a remedy which he has no right to demand unless he is a creditor. Matter of Whitehead, 38 App. Div. 319; Matter of Wagner, 119 N. Y. 28, affg. 52 Hun, 23.

The respondent concedes that, until his claim has been reduced to judgment, he has no strict legal right, but he argues that, under the general power of a surrogate to direct and control the conduct of executors and administrators, I may and should require the filing of an inventory, as a duty imposed by statute upon all executors. In support of this contention he cites Thomson v. Thomson, 1 Bradf. 24 (1849); Cotterell v. Brock, id. 148 (1850); Forsyth v. Burr, 37 Barb. 540 (1862); Creamer v. Waller, 2 Dem. 351 (1884). Other and later decisions may be found to the same effect, but they all rest on the cases decided by Surrogate Bradford in 1849 and 1850, without discussion as to the reasons for the rule. Surrogate Bradford discusses the practice of the English ecclesiastical courts, which was, of course, based on special powers belonging to them not at all applicable here, and rests his decision on a provision of the Revised Statutes then in force. This provision of law was repealed when the Code of Civil Procedure took effect, on September 1, 1880, but it does not seem to have been noticed that these early cases were thus rendered obsolete. The power of control by a surrogate over executors and administrators is, by the Code of Civil Procedure, required to be "exercised in the cases, and in the manner prescribed by statute." § 2472. Section 2716 prescribes the only cases in which the filing of an inventory may be compelled, and it can now only be done on the application of "a creditor or person interested in the estate."

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The purpose of filing an inventory is to give information to the parties having interest in the assets. Even if a discretionary power could be spelled out from the statute, to require the exhibition of the affairs of the estate on the request of a person holding an unproved and disallowed demand, such discretion should be exercised only where the surrogate is satisfied that the claim is probably meritorious, and that the opposition to it is vexatious and probably unreasonable. The facts disclosed by the affidavits submitted on this application do not lead me to any such conclusion, and, if I have such a discretionary power, I refuse to exercise it.

The application is denied.

Application denied.

Matter of the Estate of JOHN MOENCH, Deceased.

(Surrogate's Court, New York County, December, 1902.)

Transfer tax — Statute of Limitations.

A testatrix died Jan. 12, 1893, when L. 1892, ch. 399, as to taxable transfers, was in force. In 1899, chapter 737 was passed which declared that the Statute of Limitations should no longer be a defense to a proceeding to collect the transfer tax. On Nov. 18, 1902, an order was made fixing that tax on the estate. In a proceeding by the district attorney to enforce payment of it.

Held, that the defense of the six years' statute was untenable.

That, assuming the transfer tax to be "a liability created by statute", and barred in six years under Code C. P., § 382, subd. 2, and that the tax could not have been enforced under L. 1892, ch. 399, until eighteen months after the death of the testatrix on Jan. 12, 1893, a proceeding to collect it could have been taken at any time before July 12, 1900, and that before that date L. 1899, ch. 737 had taken away the defense of the statute.

Semble, that a repeal of a Statute of Limitations may lawfully be retroactive.

PROCEEDING by the district attorney of the county of New York to enforce the payment of a transfer tax.

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Julius Offenbach, for State Comptroller.

John Mulholland, for executrix.

THOMAS, S. This is a proceeding commenced by the district attorney of the county of New York to enforce the payment of a transfer tax. His petition sets forth that the testator died on January 12, 1893, leaving a will by which the respondent was appointed executrix and made sole legatee, and that said will had been duly admitted to probate and letters testamentary thereon had been issued to the respondent; that an order was made November 18, 1902, fixing the amount of transfer tax; that the Comptroller of the State had notified him in writing of the failure, neglect and refusal of the person liable to pay said tax, and that no part of said tax has been paid. The respondent appears and files no written allegation or denial by way of answer, but orally contends that, while the averments of the petition are all true, the six years' Statute of Limitations is a complete bar and defense. I will treat this as a formal and sufficient plea of the statute.

At the time of the death of the testator, the statute governing the transfer tax then in force was Laws of 1892, chapter 399, entitled "An act in relation to taxable transfers of property," the provisions of which, so far as they are applicable to the present proceeding, were substantially identical with those of our present statute. The tax became payable at the time of the transfer, to-wit, at the death of the decedent; if paid within six months thereafter a discount of 5 per centum was to be deducted and allowed, and no interest was to be charged if payment was made within eighteen months. § 4. The proceeding to enforce the payment of the tax could only be taken by the district attorney if the treasurer or comptroller of any county shall have reason to believe that any tax is due and unpaid under this act, "after the refusal or neglect of the persons liable therefor to pay the same," and shall notify the district attorney in writing of such failure or neglect. § 15.

As the law then stood, the right to maintain a proceeding such as the present one accrued to the State when the executrix either refused or neglected to pay the tax. No refusal was alleged, and the executrix was not chargeable with neglect during the six

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months within which a premium was offered for prompt payment, and probably not within the eighteen months during which payment could be made without interest. It has accordingly been held that the proceeding could not be initiated until the expiration of eighteen months. Frazer v. People, 6 Dem. 174.

Assuming that the transfer tax is a "liability created by statute," and, therefore, within the six years' limitation (Code Civ. Pro., § 382, subd. 2; People ex rel. N. Y. L. & I. Co. v. Roberts, 157 N. Y. 70), the proceeding could have been commenced at any time prior to July 12, 1900.

By Laws of 1899, chapter 737, which became a law on May 26, 1899, it was enacted, amending the Tax Law, being chapter 908, Laws of 1896, by the addition of a new article, that "The provisions of the code of civil procedure, relative to the limitation of time of enforcing a civil remedy, shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by articles nine or ten of said chapter, and this act shall be construed as having been in effect as of date of the original enactment of the corporation and inheritance tax law, provided, however, that as to real estate in the hands of *bona fide* purchasers, the transfer tax shall be presumed to be paid and cease to be a lien as against such purchasers after the expiration of six years from the date of accrual."

So far as the present respondent is concerned no right of any kind to interpose the defense of the bar of the statute was ever acquired by her, and the statute was not retroactive. It merely repealed a statute that she might have used if the State had failed to commence a proceeding within more than a year after the repeal.

Treated as a retroactive statute the Law of 1899 was, nevertheless, valid. The Statute of Limitations does not, after the prescribed period, destroy, discharge or pay the debt, but it simply bars a remedy thereon. The debt and the obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. The Legislature could repeal the Statute of Limitations and then the payment of a debt upon which the right of action was barred at the time of the repeal could be enforced by action, and the constitutional rights of the debtor are not invaded by such legislation.

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Per Earl, J., in Hulbert v. Clark, 128 N. Y. 295; Campbell v. Holt, 115 U. S. 620; People v. Starkweather, 42 N. Y. Super. Ct. 325, 335.

The application is granted, with costs to be taxed. The sum due, for tax and penalty, will be computed and inserted in the decree, since the interest on the decree will be six per cent. only.

Application granted, with costs to be taxed.

Matter of the Estate of GEORGE GUTTROFF, Deceased.

(Surrogate's Court, New York County, December, 1902.)

Statute of Limitations — An amendment to the statute cannot revive a judgment barred by the statute as it stood before the amendment.

A judgment of a District Court of the city of New York, recovered and docketed in the clerk's office of the county of New York in 1884, became barred, by the Statute of Limitations as then existing, in six years thereafter, and therefore L. 1894, ch. 307, extending the twenty years' limitation to all such judgments *thereafter* docketed in the county clerk's office of the county in which the judgment was rendered, did not and could not give the judgment of the District Court any vitality as it was barred before L. 1894, ch. 307 took effect.

APPLICATION for an order requiring the administratrix to pay a judgment recovered against the decedent in the Seventh Judicial District Court of the city of New York.

Charles Thaddeus Terry, for petitioner.

Max Steinert, for administratrix.

THOMAS, S. The application is for an order requiring the administratrix to pay a judgment recovered against the decedent on May 3, 1884, in the Seventh Judicial District Court of the city of New York. A transcript of said judgment was filed and docketed in the office of the county clerk on May 7, 1884. The decedent died on June 22, 1899. The administratrix appears and

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orally admits the possession of sufficient assets, but urges that, under the six years' Statute of Limitation, the claim is barred.

In Dieffenbach v. Roch, 112 N. Y. 621, decided in 1889, it was determined that, under the law as it then stood, the Statute of Limitations became a bar against such a judgment in six years after it was rendered. By chapter 307 of the Laws of 1894, sections 376, 382 and 3017 of the Code of Civil Procedure, were amended so as to make the twenty years' limitation apply to all judgments "hereafter (to-wit, thereafter) docketed pursuant to the provisions of section 3017." Section 376. At this time the six years' statute had run against the judgment now being considered, and section 3017 forbade the new docketing of a judgment of a court of record after the expiration of six years from its rendition. It is quite true, as contended by counsel for the creditors, that the Legislature might constitutionally have enacted a retroactive statute of limitation. Hulbert v. Clark, 128 N. Y. 295; Campbell v. Holt, 115 U. S. 620. The difficulty is that they carefully guarded against doing anything of the kind by limiting the force of the amendment to judgments which might be docketed "hereafter," to-wit, after the amendment became a law. The judgment was barred before the amendment, and the amendment did not give it any force or vitality. Matter of Warner, 39 App. Div. 91.

The application is denied.

Application denied.

Matter of the Consolidated Appeals of R. B. Wheeler and Lucy P. Hathaway from the Apportionment of the Assessment for Liberty and Pleasant Streets in Sidney, N. Y.

(County Court, Delaware County, December, 1902.)

Tax — Front-foot rule of assessment, when rejected — Proper method.

Where the Legislature has prescribed (L. 1897, ch. 414, § 268), as the method of assessing a village sewer's expense, that it be assessed upon the lands within the area of local assessment in proportion as nearly as may be to the benefit which each parcel or lot will derive therefrom, and has further directed that the ratio of such benefit shall be established, the village sewer commissioners cannot law-

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fully adopt the front-foot rule of assessment where that results in assessments which do not comply with the statutory rule.

The commissioners should, in each case, consider the effect of the improvement upon the actual market value of the property and, in that connection, the question whether the property is vacant or improved and, if unimproved, the extent and value of the improvement.

APPEAL by R. B. Wheeler and Lucy P. Hathaway from an apportionment made by the sewer commissioners of the village of Sidney for the expense of constructing sewers on Liberty and Pleasant streets in said village.

The apportionment to pay the expense of constructing such sewers was made under section 268 of article X of chapter 414 of the Laws of 1897, which is as follows: "If the whole or any part of the expense of constructing a sewer is to be assessed upon the lands benefited, the board of sewer commissioners shall prepare and file in the office of the village clerk a map and plan of the proposed area of local assessment. Such expense shall thereupon be apportioned upon the lands within such area in proportion, as nearly as may be, to the benefit which each lot or parcel will derive therefrom, and the ratio of such benefit shall be established."

It is alleged in the affidavit of R. B. Wheeler, submitted upon the argument, "that no map was made of said area of local assessment and filed with the village clerk prior to the construction of the sewer;" this omission, however, is not assigned as a ground of appeal in the notice filed with the clerk.

The cost and expense of constructing the sewer was in part apportioned and assessed upon the property owners according to the "foot frontage rule."

The R. B. Wheeler lot is situated on the corner of Liberty and Pleasant streets and the frontage on both streets was made the basis of the apportionment by the commissioners for the cost of constructing the sewer on such streets, the lot being 66 feet front on Liberty street and 141 feet on Pleasant street.

The Lucy P. Hathaway lot is situated on the corner of Pleasant and Avery streets, and the frontage on Pleasant street was made the basis of the apportionment, the lot being 66 feet front on Avery street and 123 feet on Pleasant street. In 1899 a sewer was constructed in front of the lot on Avery street and connection made with the sewer on that street.

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The lots on Liberty and Pleasant streets vary in size, many of them are 66 feet front, others are wider, ranging from 94 to 160, the lots also vary greatly in depth and some are very irregular in shape, one lot on Pleasant street is omitted from the apportionment, being the rear of lot No. 28, with no frontage on the street, except a right of way to the street, reserved in the conveyance, to pass and repass to and from the street, no right to sewer to the street being conveyed.

The lots also vary greatly in value, the Isaac Weaver lot adjoining the Wheeler lot, as appears by the affidavit of Wheeler, is assessed by the town assessors at $725, the Wheeler lot is assessed at $650, the H. H. Walton lot (No. 17, on Liberty street), is assessed at $850, the school property, corner of Liberty and Pleasant streets, is valued at $40,000, with a building to accommodate 500 children.

Andrew G. Washbon, for R. B. Wheeler, appellant.

Wm. Thorp, for Lucy P. Hathaway, appellant.

Chas. H. Seeley, for sewer commissioners, respondent.

GRANT, J. The sewer commissioners apportioned the cost of constructing the sewer on Liberty and Pleasant streets according to the "foot front rule," upon the theory that, in their opinion, the foot front rule was the most equitable and just, and in so doing, they no doubt believed such basis to be fair and equitable; the appellants claim that as the property upon the streets sewered varied greatly in area and value and also as to the benefits derived, the application of the foot front rule is not a compliance with the statute under which the apportionment is made and is not an apportionment according to the benefits derived therefrom.

The statute under which the apportionment is made provides: "Such expense shall thereupon be apportioned upon the lands within such area in proportion as nearly as may be to the benefit which each lot or parcel will derive therefrom, and the ratio of such benefit shall be established."

The Legislature having the power to direct the method to be pursued in apportioning the expense of constructing a sewer and having adopted the benefit rule in the general Village Law respecting the apportionment of the cost of constructing sewers, such method cannot be departed from.

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It does not follow that the foot front rule is necessarily erroneous; it may be the most just and equitable of any rule that can be adopted and it may also be according to the benefits derived therefrom. O'Reilley v. City of Kingston, 114 N. Y. 439. On the other hand it may not be according to the benefits to the property, depending entirely upon the conditions existing in each particular case.

Where the lots on any street sewered are of uniform size and value and all similarly improved or unimproved, as the case may be, the application of the "foot front rule" would undoubtedly be a compliance with the statute.

Where, however, the property affected varies greatly in area and value, the application of the foot front rule is not a compliance with the provisions of the statute requiring the cost to be "in proportion as nearly as may be to the benefit which each lot or parcel will derive therefrom."

It cannot be seriously contended that the Wheeler lot with a total frontage on Liberty and Pleasant streets of 207 feet, valued at $725 by the town assessors and taxed by the commissioners for benefits at $54.63, is benefited more than the school property with a frontage on Liberty street of 160 feet, valued at $40,000, with a daily attendance of about 500 children and taxed by the commissioners for benefits at $53.95. The school property has an area of two and one-half times that of the Wheeler lot, as appears from the map submitted.

What is true of the school property is also true to a certain extent of the other parcels of property on said streets with a greater area and value than the Wheeler lot.

"In assessing the expenses of street improvements upon the property benefited the general rule is to consider the effect of the improvement upon the market value of the property and to make the assessment in view of that fact without regard to the present use or the purpose of the owner in relation to future enjoyment." Matter of Klock, 30 App. Div. 24; People ex rel. Howlett v. Mayor, 63 N. Y. 291. "That principle makes it necessary that the assessors should take into consideration the value of the property, and it necessarily follows that they must take into consideration the question whether the property is vacant or improved, and, if improved, the extent and value of such improvement." Id.

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The case of Klock seems to be more nearly in point than any case to which the attention of the court has been called; the case arose in this district upon an appeal from an apportionment and is a very lucid exposition of the law in cases under this statute.

None of the cases to which the attention of the court has been called, apparently approving the foot front method of apportioning the expense of public improvements, are cases of appeal from an assessment by the commissioners; on the contrary, they are all cases in which the question came up in a collateral proceeding, under special statutes or in actions to remove a cloud upon the title.

All of the cases apparently approving the foot front method of apportioning the expense of public improvements are very carefully and exhaustively reviewed in Matter of Klock, and the discussion of that case by Judge Herrick leads to the irresistible conclusion that the statute under consideration requires the expense of constructing a sewer to be apportioned according to the benefit to be derived therefrom, and that such ratio cannot be established without taking into account the benefits as well as the frontage and the value of the property to be assessed.

The value of the property alone would not be a proper basis for apportioning the cost of public improvements like a sewer; the benefit to the property must also be considered. In the case of the Hathaway lot, the fact that a sewer had previously been constructed on Avery street, and sewer connection made on that street, should be taken into consideration by the commissioners in determining what benefit, if any, the line of sewers on Pleasant street would be to the property.

I am, therefore, of the opinion that the sewer commissioners adopted an erroneous rule in apportioning the expense of the sewer on Liberty and Pleasant streets, and the order of the sewer commissioners should be reversed and three disinterested freeholders of the village should be appointed commissioners to make a new apportionment.

Order of sewer commissioners reversed.

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EDWARD GABEL and HELEN L. GABEL, Petitioners, *v.* LOUIS WILLIAMS and GEORGE SCOTT, Defendants.

(County Court, Oneida County, December, 1902.)

Tax — Oneida county — L. 1902, ch. 559; L. 1896, ch. 908, §§ 134, 138 — Statutory construction.

Sections 134 and 138 of the Tax Law of 1896, requiring a purchaser of lands at a tax sale, not redeemed therefrom, to serve, in order to complete his title, a written notice to redeem upon any occupant or mortgagee of the lands, were not impliedly repealed as to Oneida county by L. 1902, ch. 559, a special act as to taxes in that county, and therefore where there has been no compliance with these sections of the Tax Law at a sale had in that county the purchaser cannot dispossess the occupant or a mortgagee in possession.

Where a special act declares that certain articles of the Tax Law, except certain enumerated sections, shall not apply to a county, the sections excepted are deemed to be embodied in the special act and they apply to the county.

Where the special act prescribes a notice to redeem published by the county treasurer and the Tax Law a written notice, with personal or mail service, the Tax Law governs redemption as being, of the two conflicting provisions, the one more just to the rights of all parties in interest.

Said sections 134 and 138, although in words applying only to a sale made by the State Comptroller, apply also to a sale made by the county treasurer for State and county taxes.

THIS is a summary proceeding for the removal of defendants, pursuant to section 7 of chapter 559 of the Laws of 1902. Petitioners claim to be the owners of the premises in question by reason of having purchased them at a tax sale and by having perfected their title thereto. Defendant Louis Williams is a tenant occupying said premises, and defendant George Scott claims to be a mortgagee in possession. The respective parties have submitted their rights to this court for decision upon the following written stipulation of facts:

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"ONEIDA COUNTY COURT.

"EDWARD GABEL and HELEN L. GABEL,
"*Petitioners,*
"*v.*
"LOUIS WILLIAMS and GEORGE SCOTT,
"*Defendants.*

"The parties hereto hereby stipulate by their respective attorneys that for the purposes of the trial of this action the following facts are admitted:

"That Daniel Waterman is and has been, since 1881, the owner of a certain house and premises known as No. 73 Broadway in the city of Utica, Oneida county, New York. That thereafter he leased said premises to Louis Williams, one of the defendants herein, who is, and has been for several years last past in possession of said premises.

"That the county and State taxes for the year 1900 were regularly levied upon said premises.

"That said taxes were not paid, and the county treasurer of Oneida county thereafter regularly advertised said premises for sale for said taxes.

"That on the 10th day of October, 1901, said county treasurer duly sold the same to Edward Gabel, one of the petitioners herein, for the sum of $25.73, and issued to him a certificate therefor, as provided by chapter 559, Laws of 1902.

"That on the 24th day of October, 1902, said county treasurer of Oneida county executed to Edward Gabel, one of the plaintiffs herein, a conveyance of the real estate so sold for said taxes, a copy of which is hereto annexed, which conveyance was recorded in Oneida county clerk's office on the 30th day of October, 1902. That said Edward Gabel afterward conveyed to the petitioner, Helen L. Gabel, an undivided half interest in said property.

"That said county treasurer within the three months immediately preceding the expiration of the time allowed to redeem said premises, caused a notice to be published once in each week for three weeks successively, the last publication being at least twenty days before the expiration of the time to redeem, in each of the newspapers designated by the board of supervisors of said county, for the publication of the Session Laws, a description of

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said premises sold for taxes and unredeemed, specifying the amount necessary to redeem the same, calculated to the last day in which such redemption could be made and stating that unless such lands were redeemed by a specified day, they would be conveyed to the purchaser, and also published the same notice in a newspaper published in the city of Utica. Following is a copy of the notice published:

"'(Explanation: Bk. signifies book; Mp. map; Blk, Block; Ft. feet).

"'Name.	Bk.	Mp.	Blk.	Lot.	Ft. front.
"'Waterman, Dan'l,					
"'73 Broadway.	3	21	4	18	50'

"That no other, further or different notice of the expiration of the time to redeem has been published, served upon, or given to any person whatever. That there is a mortgage upon said premises held by George Scott, of Utica, New York. That the city of Utica purchased said premises at a tax sale for city taxes for the years 1896–97 and 1898, and duly filed in the Oneida county clerk's office a certificate of sale therefor, but took no other steps to perfect its title.

"That after said sale for said taxes and prior to the commencement of this action, default was made in the payment of the said mortgage to said George Scott, and possession given to him under the terms of said mortgage. That said Williams thereupon entered into an agreement with said Scott and is now in possession under the mortgage.

"That no personal notice to redeem was served upon the owner, occupant or mortgagee, as required by the Tax Law, and said mortgagee claims the right to possession under the terms of his mortgage and the right to redeem, and that the lien of said mortgage is not destroyed. That the occupant and mortgagee claim no sufficient or proper notice of sale or redemption was ever published describing said property.

"That chapter 559, Laws of 1902, is admitted in evidence and a part of this stipulation.

"The defendant Louis Williams claims the right to the possession of said premises under his lease with said Waterman, and under the agreement made with the mortgagee, upon the ground that plaintiffs have failed to serve upon either the owner, occupant

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or mortgagee, a personal notice to redeem, as required by the Tax Law, and that the time to redeem has not yet expired.

"Plaintiffs claim ownership of said premises, in fee simple, freed from the lien of said mortgage and the immediate right to possession thereof by virtue of the deed given October 24, 1902, by the county treasurer of Oneida county, under chapter 559, Laws of 1902.

"M. E. ROBINSON,
"Atty. for Petitioners.
"E. D. LEE,
"Atty. for Defendants."

M. E. Robinson, for petitioners.

E. D. Lee, for defendants.

DUNMORE, J. The main question involved on this hearing is whether or not the purchaser of the property in question at a tax sale was required to serve a personal notice to redeem upon the occupant in possession of the lands pursuant to section 134 of the Tax Law, or upon the mortgagee of the lands, pursuant to section 138 of the Tax Law. No claim is made but that the assessment of the tax and the proceedings leading up to and including the tax sale were regular. But it is asserted on the part of defendants that sections 134 and 138 of the Tax Law are in force and apply to Oneida county and that the failure of petitioners to serve the notice required by those sections renders the deed void. The proceedings to acquire the title to the premises in question were taken pursuant to chapter 559 of the Laws of 1902, which is a special act in relation to the enforcement and collection of taxes in the county of Oneida. Section 6 of that act provides for the publication of the notice of the sale of land for taxes, and the manner of conducting the sale. Section 8 provides that the owner, occupant or any other person may redeem, etc., and also provides that the holder of a mortgage upon real estate sold for taxes who shall redeem the same shall have a lien upon the premises redeemed for the amount so paid with interest from the time of payment in like manner as if it had been included in the mortgage. Section 9 contains the only provision contained in said act in regard to publication or service of a notice to redeem. That section provides that the county treasurer shall, within the three months immediately

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preceding the expiration of the time allowed for the redemption of lands sold by him for taxes, cause a notice to be published once in each week for three weeks successively, the last publication to be at least twenty days before the expiration of the time to redeem, in each of the newspapers designated by the board of supervisors of said county to publish the Session Laws, containing a list of the lands in such county sold for taxes and unredeemed, specifying particularly every parcel unredeemed, etc. The act further provides that if neither of said papers is published in the city of Utica, then the county treasurer shall, in addition thereto, publish such list in a newspaper published in the city of Utica. The section further provides that no error or imperfection in said notice, as published, shall in any way affect the sufficiency or validity of such notice or that of any subsequent proceeding or conveyance based thereon. *That no other, further or different notice of the expiration of the time to redeem shall be required to be published, served upon or given to any person whatever.* That in case the property sold is not redeemed, the county treasurer shall execute to the purchaser, his heirs or assigns, a conveyance of the real estate so sold and unredeemed, which shall vest in the grantee an absolute estate in fee, free from all liens, claims and incumbrances of every name and nature whatsoever, subject only to such claims as the State of New York and county of Oneida may have thereon for taxes and other liens.

Section 10 provides the manner of executing the conveyance by the county treasurer and provides that such conveyance shall be presumptive evidence that the sale and all proceedings prior thereto from and including the assessment of the lands sold, and that all notices required by law to be given previous to the expiration of the time allowed by law for the redemption thereof, were regular and in accordance with all the provisions of law relating thereto. That after the expiration of two years from the date of such conveyance such presumption shall be conclusive, the sale and conveyance thereof shall become absolute, and the occupant and all others interested in the land be forever barred from all liens upon, claims against, interest in or right or title thereto.

Section 13 contains, among other things not involved on this appeal, the following provision: "All the general laws of this state, in relation to the assessment and collection of taxes, and the sale and redemption of lands sold therefor and not inconsistent

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with the provisions of this act, shall, so far as they are applicable, be in force in respect to the assessment and collection of taxes in the county of Oneida."

Section 15 provides as follows: "Articles five, six and seven of the Tax Law, except sections one hundred twenty-one, one hundred twenty-three, one hundred thirty-three to one hundred thirty-nine, inclusive, of article six, and section one hundred fifty-six of article seven, shall not apply to the county of Oneida, and all other acts or parts of acts inconsistent with the provisions of this act shall not apply to the county of Oneida. This act shall apply to the tax sale held in the county of Oneida in the year nineteen hundred one in the same manner as if such sale had been held pursuant to the provisions of this act with such act then in effect. This act shall also apply to any tax sales hereafter held in the county of Oneida."

Section 134 of the Tax Law, which is one of the sections contained within the above exception in section 15 of the Oneida County Law provides for the personal service of a written notice to redeem upon the occupant of lands sold for taxes and unredeemed or by leaving the same at the dwelling-house of the occupant with a person of suitable age and discretion, belonging to his family.

Section 138 of the Tax Law, another of the sections excepted from the portion of the Tax Law not made applicable to Oneida county by section 15 of the special act, provides as follows: "The lien of a mortgage, duly recorded or registered at the time of the sale of any lands for nonpayment of any tax or assessment thereon, shall not be destroyed, or in any manner affected except as provided in this section. The purchaser at any such sale shall give to the mortgagee a written notice of such sale within one year from the expiration of the time to redeem."

The stipulation of fact shows that the purchasers have made no attempt to comply with sections 134 or 138 of the Tax Law, their contention being that, so far as Oneida county is concerned, those sections of the Tax Law are either repealed or made not applicable. They also contend that section 9 of the special law provides for the publication of a notice to redeem for three months and that the words contained in said section that: "No other, further or different notice of the expiration of the time to redeem shall be required to be published, served upon or given to any

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person whatever" by necessary implication excludes the necessity of any compliance with sections 134 and 138 of the Tax Law. Upon the other hand defendants contend that by section 15 of the Oneida County Law sections 134 and 138 of the Tax Law are made applicable to Oneida county, and that by reason of the failure of the purchasers at tax sale of the premises in question to comply with those sections, the purchasers acquired no title to the premises and are not entitled to maintain this proceeding.

Section 15 of the Oneida County Law provides that articles 5, 6 and 7 of the Tax Law shall not apply to Oneida county with the exception of sections 134, 138, etc. The special act, therefore, by necessary implication, provides that those sections do apply to Oneida county. Whatever is necessarily implied in a statute is just as much a part thereof as if written therein. People ex rel. Huntington v. Crennan, 141 N. Y. 239, 244; Riggs v. Palmer, 115 id. 506.

It is also a rule of law, that all acts in *pari materia,* are to be taken together as if they were one law. McCartee v. Orphan Asylum Society, 9 Cow. 437, 506.

We must then construe sections 134 and 138 of the Tax Law as a part of the Oneida County Act. Those sections which provide for personal notice to the occupant and mortgagee are in conflict with section 9 of the Oneida County Law, which provides that no notice other than that published need be given, and the question is presented here as to which section shall prevail. It is a well-established rule in the interpretation of statutes that where a sense is to be supplied to inaccurate or incomplete words in an enactment, that sense which works an injustice should be avoided. Polhemus v. Fitchburg R. R. Co., 123 N. Y. 502, 509; Hayden v. Pierce, 144 id. 512, 516; People v. Jaehne, 103 id. 182, 197; O'Grady v. New York Mut. Live Stock Ins. Co., 16 App. Div. 567, 571.

A construction of an act should be avoided which would injuriously affect the rights of others, and that sense should be attached to its provisions which will harmonize its objects with the preservation and enjoyment of all existing rights. Suburban R. T. Co. v. Mayor, 128 N. Y. 510, 523.

Legal hermeneutics, when applied to the construction of statutes, teach us to reject a construction which is contrary to natural justice and equity, or which will necessarily be productive of

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practical inconvenience to the community, unless the language of the law-giver is so plain and explicit as not to admit of a different construction. Donaldson v. Wood, 22 Wend. 395, 397.

The primary purpose of interpretation is to ascertain the intent of the lawmakers, and in statutes, as other instruments, clauses in themselves absolute and unqualified may be limited by other clauses and provisions. The whole context of a statute may be examined to ascertain the meaning of a particular clause, and this becomes necessary where the meaning is doubtful or where by giving a particular clause full effect it would come in conflict with other clauses. A statute, like a will or contract, is to be construed as a whole, and in applying this principle of construction it is not material in what order provisions, which at first blush seem contradictory, are placed. The meaning is to be collected *ex antecedentibus et consequentibus,* and a later provision may be qualified by a prior one, or the contrary. When the effort at a reconciling construction fails, and the repugnancy of different parts is absolutely irreconcilable, courts sometimes solve the difficulty by applying the somewhat arbitrary rule that the last expression of the lawmaker in the act embodies the final intent, and on this ground give it effect, rejecting the prior inconsistent provision. But this is a rule to be resorted to only *in extremis.* People ex rel. Mason v. McClave, 99 N. Y. 83, 89.

The rule that where the provisions of a prior statute are repugnant to the provisions of a later statute the former act is to that extent repealed does not apply here, because next to the last section of the Oneida County Law excepts sections 134 and 138 of the Tax Law from the provisions of the latter law which are not to apply to said county, thereby impliedly making them a part of the Oneida County Law and practically re-enacting them. The reference to those sections in section 15 of the special act was such as to show conclusively that the Legislature did not intend to repeal them as to this county. People ex rel. Stiner v. Morrison, 78 N. Y. 84.

Sections 134 and 138 were not repealed as to Oneida county unless such was the intention of the Legislature. Anderson v. Anderson, 112 N. Y. 104, 111.

Repeals by implication are not favored in law. People ex rel. Olcott v. House of Refuge, 22 App. Div. 254, 259; Matter of Mayor, 97 N. Y. 572, 578; Hankins v. Mayor, 64 id. 18, 21.

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To give effect to all the provisions of section 9 of the Oneida County Law would practically give no effect whatever to sections 134 and 138 of the Tax Law. While upon the other hand, to give full effect to sections 134 and 138 would still leave section 9 of the special law in full force, excepting as to the clause providing that no other notice need be served upon any person whatever. I think the latter construction would do the least violence to the act as a whole and would come the nearest to giving effect to all the provisions of the act.

It was held in McCartee v. Orphan Asylum Society, 9 Cow. 506, that these repeals carry along with them a tacit reflection upon the Legislature, that they should ignorantly and without knowing it make one act repugnant to and inconsistent with another; and such repeals have been ever interpreted so as to repeal as little of the preceding law as possible.

It is also well settled that words absolute of themselves, and language the most broad and comprehensive, may be qualified and restricted by reference to other parts of the same statute in which they are used, and to the circumstances and facts existing at the time and to which they relate or are applied. Smith v. People, 47 N. Y. 330, 337.

Construing sections 134 and 138 of the Tax Law as limiting the one clause referred to in section 9 of the special act, leaves those sections in harmony with the other provisions of such special act. This is the correct rule for the construction of conflicting statutes or conflicting provisions of the same statute. Hankins v. Mayor, 64 N. Y. 18; People ex rel. Kingsland v. Palmer, 52 id. 83; Monegan v. People, 55 id. 613; People ex rel. Maloney v. Edwards, 56 Hun, 377.

It is urged that the special act was intended to cover the entire field and, therefore, any statutory provisions in conflict with it should be deemed repealed. While I admit that that is the rule, I do not think it applicable to this case for the reason that by section 15 of the special act sections 134 and 138 are practically made a part of that act, and must be construed as a part of it. A further answer to the above argument is that the special act was not intended to cover the entire field, as shown by that portion of section 13 which provides that all the general laws of this State in relation to the assessment and collection of taxes and the sale and

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redemption of lands sold therefor, and not inconsistent with the provisions of this act, shall, so far as they are applicable, be in force in respect to the assessment and collection of taxes in the county of Oneida.

It is also urged that section 134 of the Tax Law cannot apply to Oneida county, because that section only refers to sales by the comptroller, while the Oneida County Law provides that all sales shall be by the county treasurer. But it must not be overlooked that section 157 of the Tax Law provides that the provisions of article 6 of said act, entitled "Sales by comptroller for unpaid taxes and redemption of lands," which includes section 134, shall, in so far as it is not otherwise therein provided, govern and control the action of the county treasurer, who shall perform the duties therein devolved upon the comptroller, and the same rights and remedies shall be deemed to exist under the provisions of this article as are provided for in said article 6, and section 13 of the Oneida County Law, as we have already stated, provides that all the general laws of this State, in relation to the assessment and collection of taxes, and the sale and redemption of lands sold therefor, and not inconsistent with the provisions of said act, shall, so far as they are applicable, be in force in respect to the assessment and collection of taxes in the said county of Oneida. It is, therefore, entirely proper in construing section 134 of the Tax Law, as a part of the Oneida County Law, to substitute county treasurer in place of comptroller. And in harmonizing the two acts it is in like manner our duty to hold that a payment to redeem in the county of Oneida should be made to the county treasurer instead of into the State treasury. The rule, of necessity, does not help the petitioners in this case. I see no necessity for a statute dispensing with personal notice to redeem. If there has been any demand or necessity for it I failed to hear of it. We have several classes of people in our county upon whom it would be a great hardship. The habitual or voluntary tax defaulters are entitled to no sympathy. But all who default in the payment of their taxes are not such. We have in our county a large number of people unable to read or write and unable to speak our language. They know very little about our business methods, and when they pay one tax they quite naturally suppose that to be all their taxes for the year. Their property is subsequently sold upon the other tax and the notice of sale published miles from their home. They

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never see it or know of it. The same is true of the published notice to redeem. In the meantime the owners of the property, relying upon their receipt for a single tax, remain in blissful ignorance of the fact of the sale and the expiration of the time to redeem. If, upon the other hand, a notice were served upon them it would, doubtless, be taken to somebody who would explain the true situation. But the unfortunate people who are likely to be the victims of such a law are not limited to the classes who are unable to speak our language or who are unable to read or write. Women who, unaccustomed to transact business during their husbands' lives, upon the latter's death suddenly find themselves compelled to look after the details of business in person, are nearly as likely to become victims of such a law as the class previously mentioned. We also have the feeble-minded and people in asylums who are unable in person to see to the payment of their taxes. If personal notice to redeem is served, it is likely to find its way to some of their friends who would look after the matter in their interest. That much may be said in regard to the necessity of personal notice to redeem upon the owners or occupants of the property.

Justice and fairness require that personal notice to redeem should also be given to the mortgagees. Oftentimes the mortgagee lives hundreds of miles away from the property upon which he has taken security. It is not his duty to pay the taxes upon the property. A published notice to redeem would not in the ordinary course of events reach him.

But this is not all the mischief which may result from the special act if it is to be given the construction contended for by the petitioners. Under that construction a man who has paid his taxes may lose his property without knowing any adverse claim is made upon it. Section 10 provides that the county treasurer's conveyance shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of the lands sold, and that all notices required by law to be given previous to the expiration of the time allowed by law for the redemption thereof, were regular and in accordance with all the provisions of law relating thereto. After two years from the date of such conveyance such presumption shall be conclusive, the sale and conveyance thereof shall become absolute, and the occupant and all others interested in the land be forever barred from all liens upon, claims against, interest in, or right or title thereto.

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If, therefore, the public officers by mistake advertise for sale for taxes lands upon which the taxes have been paid and take the subsequent proceedings required by this act, and notice does not come to the owner or mortgagee of such proceedings until after the expiration of the two years upon which the conveyance becomes absolute, they lose their property and are apparently without redress. A construction of a statute that would practically confiscate property without the fault of the owner and without his knowledge should not be given unless the language is so clear and unambiguous as to bear no other construction. Where a person is seeking to seize upon the home of another, or, perhaps, the savings of a lifetime for part of one year's tax, I do not think it any hardship to require him to give personal notice to redeem to the occupant of the home or the owner of the savings. I am satisfied that the purchasers were bound to comply with sections 134 and 138 of the Tax Law, and that by reason of their failure to so comply they have not acquired such an interest in the premises in question as to entitle them to maintain this proceeding.

The proceeding should, therefore, be dismissed, with costs.

Proceeding dismissed, with costs.

HORACE G. ALLEN, as Receiver, Etc., Plaintiff, *v.* THE UNITED CIGAR STORES CO., Defendant.

(Supreme Court, New York Trial Term, December, 1902.)

Action by a receiver to recover a debt — Attachment for a debt void where its situs is foreign — Payment to wrong party.

A debt due from a foreign corporation to a foreign firm has no *situs* in the State of New York and cannot lawfully be attached here by a creditor of the corporation in an action against it, and hence payment therein affords the corporation no defense to a subsequent action by the firm's foreign receiver to recover the same debt, and the said payment has no greater effect than a mere voluntary one made to a third party.

TRIAL by the court without a jury, upon consent.

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H. B. Closson, for plaintiff.

John W. Ingram, for defendant.

BISCHOFF, J. The action is brought by the plaintiff as receiver of the partnership of F. Abraham & Son, under appointment by the Superior Court of Massachusetts, to recover a debt due from the defendant, a foreign corporation, to the firm. The defense is that the amount of the indebtedness in suit had been paid over by the defendant to or for the benefit of The Surbury Company, another foreign corporation, upon an attachment obtained by the latter in its action against the partnership of F. Abraham & Son, instituted in this county.

At the time of the issuance of the attachment, the plaintiff had been appointed receiver, but it is apparent from the record of the Massachusetts court that the appointment was not of such a character as to vest title to the property in the receiver. He was appointed to preserve the assets of the partnership during the pendency of the action, and for this purpose, in the absence of some provision of the statute, he was what is known as a common-law receiver, or custodian, merely.

Therefore, if the attachment were valid, there could be no doubt as to the sufficiency of the defense interposed in this action, since the present plaintiff could interpose no title as against the attaching creditor which might relate to the time of the levy under attachment, but it is shown and, indeed, conceded, that by a later order of the Massachusetts court the plaintiff was given all the necessary authority to maintain the present action, and, if the attachment may be assailed upon jurisdictional grounds, he is in a position to assert its invalidity.

Within the rules laid down in the case of Douglas v. Phenix Insurance Co., 138 N. Y. 209, 219, I conceive that this attachment must necessarily be held void as against the partnership and its receiver. The property attached was a debt due to a nonresident from a foreign corporation and the attaching creditor of the nonresident was also a foreign corporation.

Whether the *situs* of the debt be fixed at the place of residence of the debtor or of the creditor (the residence of a foreign corporation being confined to the sovereignty which created it), the property attached was never within the State of New York, and

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the court at no time obtained jurisdiction of the defendant to the attachment suit. See Wood v. Furtick, 17 Misc. Rep. 562.

The payment by the present defendant to The Surbury Company was not, therefore, a payment of the debt due from the former to the firm which this plaintiff represents, and the fact of that payment has no greater effect than a mere voluntary payment by the debtor to a third party.

The defendant's objections to the documentary evidence offered by the plaintiff are sustained, and judgment is directed for the plaintiff for the amount due, according to the pleadings and stipulations.

Judgment for plaintiff.

ELSIE M. JEWETT, Plaintiff, *v.* MELINDA P. SCHMIDT and BACHE McEVERS SCHMIDT, Individually, and as Administrators with the Will Annexed of GEORGE PARBURY POLLEN, Deceased, et al., Defendants.

(Supreme Court, New York Special Term, December, 1902.)

Testamentary trust in personalty — Construction — Right of a remainderman in a fund to have a trustee of it appointed where all the original trustees have died.

A bequest giving the testator's daughter, Melinda, "the interest or income as it accrues" of a named sum of money during her natural life, to be set apart in certain of his stocks, with further directions that at her death the fund is to go to her legal issue equally after they have reached majority, creates a valid active trust but negatives the idea that Melinda is ever to have the principal.

Where the executors, after setting apart the fund and for some time paying over its income to Melinda as trustees, have all died, administrators with the will annexed have no right to hold the fund and a daughter of Melinda is entitled as remainderman to bring, while Melinda is living, an action to have a trustee of the fund appointed and have it paid over to him.

The plaintiff, the daughter of the defendant Melinda P. Schmidt, brings this action by virtue of her interest as remainderman in the fund set apart by the following provision of the last

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will and codicil of her grandfather, George Parbury Pollen, who died in 1877: "To my daughter Melinda I also give the interest or income as it accrues on Two hundred thousand ($200,000) dollars during her natural life, the said amount to be set apart in such good dividend paying stocks as may stand in my name at the time of my decease, and at the then market value of the same. And at her death I will that the said amount of Two hundred thousand ($200,000) dollars go to her legal issue in equal portions after they severally reach the full age of twenty-one years."

Thomas J. Falls, for plaintiff.

Barclay E. V. McCarty, for defendants Schmidt.

A. Coleman Smith, for defendant F. L. Schmidt, Jr.

KEENER, J. The plaintiff is entitled to an interlocutory judgment appointing a trustee and a referee to take and state the accounts and directing that the amount of the trust fund as ascertained by said accounting be paid over to said trustee. Royce v. Adams, 123 N. Y. 402; Horsfield v. Black, 40 App. Div. 264; Wildey v. Robinson, 85 Hun, 362.

A trust was created by the provisions of this will. Matter of Hecht, 71 Hun, 62. The principal is not given to Melinda P. Schmidt for life, but only the "interest or income *as it accrues.*" The case at bar differs in that particular from Butler v. Butler, 41 App. Div. 477, and Snedeker v. Congdon, 41 id. 433. The direction that she was to have the interest or income as it accrued negatives the idea that she was ever to receive the legal title to the principal. In the case at bar the question is whether she has title, in any capacity, to the fund in dispute; whereas, in the Butler case, the question was not whether Orlando Butler had title or not, but in what capacity he held title. The present case differs further from the Snedeker case, in that the will in the latter expressly named the gift a "life estate."

The question of the creation of a trust by the provisions of the will under consideration has in fact already been determined in a proceeding had before the late Mr. Justice Van Vorst, to which

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the defendant Melinda P. Schmidt was a party, and in which judgment was entered on June 16, 1880. The complaint in that action prayed for a construction of the will, and the judgment therein clearly established a trust and directed the setting aside of the trust fund now in dispute. The then executors accordingly set apart a fund, the income of which they paid regularly to Melinda P. Schmidt and as to which they accounted, as trustees, in the Surrogate's Court in proceedings to which she was also a party and in which they received commissions as trustees. On the setting apart of this fund, it ceased to be a part of the estate and was of necessity held by the former executors as trustees, since it is no part of an executor's duty to hold funds as an investment for the purpose of paying the income therefrom to beneficiaries Matter of Union Trust Co., 70 App. Div. 5; Matter of Dewey, 153 N. Y. 63. When the defendants Melinda P. Schmidt and Bache McEvers Schmidt were appointed administrators with the will annexed, on the death of the surviving executor, the fund thus set apart and which is the subject of controversy here, had ceased to be a portion of the unadministered estate of George P. Pollen, deceased, and they were not entitled thereto under their letters of administration. To use the language of Mr. Presiding Justice Van Brunt, "How the administrators with the will annexed can take anything in respect to this part of the estate, or exercise any authority over it, is inexplicable." Horsfield v. Black, 40 App. Div. 264, 267.

The plaintiff is entitled to her costs and disbursements and an allowance of $500, all to be paid out of the trust fund. Complaint dismissed as to the infant defendant Melinda P. Schmidt, with an allowance of twenty-five dollars, together with her disbursements, to be paid out of the trust fund, but without a separate bill of costs. Settle decision and interlocutory judgment on one day's notice.

Ordered accordingly.

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ANTHONY SCHWOERER, Plaintiff, *v.* JOHN P. LEO, Defendant.

(Supreme Court, New York Special Term, December, 1902.)

Marketable title — Building restriction.

In January, 1886, one Monteith, the owner of eighty-four feet on the north side of a street running east and west, conveyed to one Williams the easterly twenty-five feet with a covenant that any building erected on it should be set back from the building line at least sixteen feet, and, in February, conveyed to him the next westerly eighteen feet with a set-back covenant which expired in 1901. In 1892 Monteith's executors conveyed to one Westervelt the remaining forty-one feet without such a covenant. No general scheme existed in the locality to set back the houses sixteen feet from the building line nor did Monteith impose any such restriction upon lots he owned upon the south side of the same street. A purchaser from the defendant, of a plot containing seven feet of the twenty-five foot plot, refused the title as unmarketable and sued for what he had paid on account.

Held, that the title was marketable.

That the covenant ran only to Monteith.

That if an easement ever existed in favor of the eighteen foot plot, it was extinguished when, in February, 1886, the title to it and to the twenty-five foot plot united in Williams, and the easement was not revived by him.

That Monteith did not intend to reserve for the forty-one foot plot any easement over the twenty-five foot plot and that, if he did, his executors did not, by their deed to Westervelt, convey to him any easement that any building, whenever it might be erected on that plot, should be set back.

ACTION to recover money paid on account of a contract for the purchase of real estate.

Albert L. Phillips, for plaintiff.

Dulon & Roe, for defendant.

SCOTT, J. This is an action to recover the money paid on account of a contract for the purchase of real estate, on the ground that the defendant cannot convey a good and marketable title.

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The premises covered by the contract consist of a lot on the northerly side of West One Hundred and Fifty-fourth street, between St. Nicholas and Amsterdam avenues, containing twenty-five feet in width. The incumbrance alleged relates to the seven feet on the easterly side of the lot. The property comprises part of a plot eighty-four feet in width conveyed in 1881 by Sarah Palmer to James Monteith. In January, 1886, Monteith conveyed to Edward E. Williams the easterly twenty-five feet of the plot by a deed which contained the usual covenant against nuisances, and a further covenant that the premises should not be occupied for other purposes than as a private dwelling for a period of fifteen years, and that any building to be erected upon the premises should not be nearer the building line than sixteen feet. It is this covenant requiring the building to be set back which constitutes the incumbrance set up in the complaint, since the lot contracted to be conveyed includes seven feet of the lot described in the aforesaid deed. In February, 1886, Monteith conveyed a plot eighteen feet in width, adjacent to the lot above conveyed, on the west thereof, to the same Edward E. Williams, by a deed containing the usual covenant against nuisances and a further covenant that the premises should not be occupied for any purpose other than a private dwelling for a period of fifteen years, and that any building to be erected upon said premises during that period should not be nearer to the building line than eleven feet. The premises then conveyed comprise a part of the property contracted to be sold by defendant to plaintiff, and since fifteen years have elapsed they are not now subject to the set-back covenant. The forty-one feet comprising the westerly half of the plot conveyed by Sarah Palmer to James Monteith were not sold by the latter during his lifetime, but were conveyed by his executors in 1892 by a deed which contained a covenant against nuisances, and a covenant that for a limited period the premises should be occupied only for a private dwelling, but contained no covenant respecting the setting back of any building that might be erected. Monteith never owned any other property on the north side of One Hundred and Fifty-fourth street. He did own property on the south side of the street between the same avenues which was conveyed by his executors to several grantees by deeds containing covenants against nuisances, and against erecting anything but private dwellings for a period of fifteen years, but no set-back covenant. To the west

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of the lot first conveyed by Monteith to Williams stand eleven houses and lots acquired by John Kelly by deed dated October 16, 1874, and conveyed by Anna P. Kelly, devisee of John Kelly, in 1902. These houses, which have been standing for some twenty years, are built upon a terrace, and are actually set back from the building line, but neither the deed to Kelly nor the deed from Mrs. Kelly contains any restrictions or covenants as to the setting back of any building to be erected upon the lots. Hence, if the plaintiff's contention be upheld, the twenty-five feet conveyed by Monteith to Williams in January, 1886, is the only lot upon the northerly side of the street upon which a building cannot be erected out to the building line. It will be observed that there were no reciprocal easements imposed upon any other lot, in favor of the lot first conveyed to Williams, nor was there any mutuality of covenant to sustain Williams' covenant to set back any building to be erected. As to all his other property Monteith kept himself free to build as he chose. This lack of mutuality, or reciprocal obligation distinguishes the present case from the authorities upon which the plaintiff relies. Trustees of Columbia College v. Lynch, 70 N. Y. 440; Kountze v. Helmuth, 67 Hun, 343; Lattimer v: Livermore, 72 N. Y. 174; Wetmore v. Bruce, 118 id. 322; Raynor v. Lyon, 46 Hun, 227. Nor can it be said that the restriction contained in the first deed to Williams constituted part of a general and uniform plan of restriction, since nowhere else is to be found any evidence of such a scheme. On the contrary Monteith's second deed to Williams and all the deeds by Monteith's executors negative any presumption that they or Monteith intended to establish a general scheme of perpetual restriction upon building out to the building line. The case as presented by the proof is brought squarely within Equitable Life Assurance Society v. Brennan, 148 N. Y. 661, wherein the court said: "If the covenant is silent; if there is no mutual agreement or understanding between the various owners creating an easement; if there is nothing in the surrounding circumstances from which mutual rights can be fairly inferred, then no action (for an injunction to restrain the violation of a covenant) can be maintained." I am clearly of the opinion that the covenant in question ran only to James Monteith and was not intended to run, and in fact did not run in favor of any grantee from him or his executors of any other lot or parcel of

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land; upon the conveyance to Williams of the adjoining lot on the west in February, 1886, the easement, if it ever existed in favor of the lot secondly conveyed, was extinguished as to that lot by the union of the title to both lots in the same owner (Post v. Weil, 115 N. Y. 361), and that the restriction was never revived by Williams, the only restriction contained in his deed to Clara M. Williams of the property now in dispute being the covenant against nuisances contained in the second deed from Monteith to Williams; that Monteith did not reserve or intend to reserve as to the property first sold to Williams an easement in favor of the land which he retained, and if he did that his executors by their deed to Westervelt of the westerly half of the property acquired by Monteith from Palmer did not convey to Westervelt any easement as against the property in question that it be perpetually set back. I, therefore, find no such incumbrance upon the property as is pleaded by the plaintiff as a reason for rejecting the title, and as all the evidence necessary to establish the freedom of the property from incumbrance is a matter of record, I find the title to be not only good, but marketable. There must, therefore, be judgment for the defendant dismissing the complaint upon the merits, with costs and an extra allowance of sixty dollars.

Judgment for defendant, with costs and an extra allowance of sixty dollars.

CHARLES J. ROUSSEL, Plaintiff, *v.* HENRIETTA L. LUX, Defendant.

(Supreme Court, New York Special Term, December, 1902.)

Marketable title — Building restriction — Reformation of a contract, for mutual mistake, denied — Failure of proof of mistake.

An existing enforcible restriction forever preventing any building, erected upon the land contracted to be sold, from being built out to the street line entitles the vendee to reject the title where the contract of sale calls for a fee simple.

Reformation of a contract cannot be decreed for mutual mistake unless there is convincing proof that there was such a mistake and also what the real agreement was.

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Proof that, before a contract to sell land was drawn by the vendee's agent, he had in his possession a policy, insuring the title, and that a schedule annexed thereto set up the building restriction by its date and the book and page of the record of it, does not, without more, show that the vendee must have intended the contract to be so drawn as that the title should be subject to the building restriction.

ACTION to recover back a deposit paid upon a contract for the sale of land, and to recover the expenses incurred in examining the title.

Alexander & Green, for plaintiff.

Fromme Brothers, for defendant.

SCOTT, J. This is an action to recover back the deposit paid upon a contract for the sale of a lot of land in West Fifty-first street in the city of New York, and to recover the expenses incurred in examining the title, and for a decree that the amount found to be due to plaintiff be declared to be a lien upon the property described in the contract. On December 15, 1900, the parties to this action entered into a written contract whereby the defendant agreed to sell and convey to the plaintiff a lot of land with the building thereon, on the north side of West Fifty-first street. She agreed to execute and deliver to him a proper deed containing a general warranty and the usual full covenants for the conveying and assuring to him the fee simple of the said premises, free from all incumbrance, except yearly agreement with present tenant, and the privilege of defendant to remain in the apartments then occupied by her until the following February. Upon the signing of this contract plaintiff paid defendant $1,000, and he has incurred considerable expense in having the title examined. At the time fixed for closing the title, and again in his complaint the plaintiff has raised several objections to defendant's title. All but two of them, however, were waived on the trial. One of the objections is that the property was subject to a perpetual easement or restriction which would forever prevent any building erected upon the land from being built out to the street line. It appears from the evidence that in the year 1879 one Henry Clifford owned the lot described by the contract, having a frontage of twenty-five

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feet on the street, and James A. Stryker and Ambrose Stryker owned a plot adjacent thereto on the east having a frontage of 125 feet on the street. None of these lots were then built upon, but there were a number of other houses upon the northerly side of the same block all of which were set back at a uniform distance of about five feet from the street line. Clifford and the Strykers entered into an agreement in writing wherein they recited their respective ownerships as above, and that they had agreed with each other that when their lots were improved by having a house or houses built thereon such part of each of said lots as lies between Fifty-first street and a line parallel thereto, and equally distant therefrom with the line of the front of the dwelling-houses on the northerly side of Fifty-first street adjoining their premises, should be left and kept as and for an open space or court similar to the open space or courts in front of the aforesaid several dwelling-houses then erected on the said northerly side of Fifty-first street. They then mutually agreed with each other that they had laid out and appropriated, and thereby did lay out and appropriate such parts of the lands owned by them respectively as are above described as and for an open space or court to remain unobstructed forever after the said lots shall have a house erected thereon, otherwise than by the necessary steps for entrance platforms and pedestals and railings connected therewith and inclosing the same and the foundations and copings upon which the said railings may be placed. They further for themselves, and their respective heirs and assigns mutually covenanted, promised and agreed with each other that the said space or court in front of the said lots of land so to be taken from each of them should forever be and remain an open space or court and should never at any time thereafter be appropriated for or occupied by any edifice, building or wall nor be obstructed otherwise than by the necessary steps for entrance platforms and pedestals and railings connected therewith and inclosing the same and the foundations and coping upon which said railings may be placed. It was further mutually covenanted and agreed between the said parties that their agreements should be, and they were declared to be, covenants running with the lots of land owned by the parties respectively and with the title thereto and should be equally obligatory upon the heirs and successors of the several respective parties and upon all and every person and persons who should thereafter become and be the owner or owners

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of the said lots respectively. This agreement was duly recorded in the register's office. It cannot be doubted that by this agreement Clifford and the Strykers created mutual and reciprocal easements over their respective lands that no building should ever be so erected upon any of the lots as to cover the entire lot, and if the present or future owner of any lot covered by the agreement should undertake to so build he would undoubtedly be liable to an action at the hands of any owner of either of the other lots. Assuming this agreement to be enforcible, and I see no reason why it is not, a purchaser of any lot would be deprived of the beneficial use of a considerable portion of it. It needs no argument to show that such an agreement creates an incumbrance upon the title, and that a deed of the property subject to such restrictions would not convey to plaintiff what the defendant contracted to give him. The defendant, apparently recognizing the infirmity of her title, asks by her answer that the contract of sale be reformed, by excepting from the agreement to give a deed which should convey to plaintiff the fee simple of the premises free from all incumbrance the restrictions and covenants contained in the above-mentioned agreement between Clifford and the Strykers. Her allegation in this regard is that the attention of plaintiff was called to this agreement before he entered into the contract, and that he made the contract with full knowledge thereof, but that the restrictions were not excepted from the contract by mutual mistake and mutual oversight of plaintiff and defendant and the error of the party who drew the contract. The reformation of agreements by reason of the mutual mistake of the parties who made them is a well-recognized branch of equity jurisdiction, but to succeed in obtaining a decree for such a reformation the burden always rests upon the party seeking it to establish by clear, positive and convincing evidence that there was a mutual mistake, and what the real agreement was. The proof must be so convincing as to leave no room for doubt. Mead v. Westchester Fire Ins. Co., 64 N. Y. 453; Christopher & T. St. R. R. Co. v. Twenty-third St. R. Co., 149 id. 51. The evidence relied upon by the defendant falls far short of satisfying these stringent rules. It rests wholly upon the fact that before the contract was drawn one Robertson, who was plaintiff's agent in the transaction, and who drew the contract, received from defendant a policy of insurance of her title issued by a title company, to which was attached a schedule pur-

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porting to show estates, defects or objections to title and liens, charges and incumbrances thereon which do or may now exist and against which the company did not guarantee or agree to indemnify. In this schedule appeared assessments not confirmed, taxes and water rents for several specified years, and the agreement between Clifford and the Strykers, which was described merely by its date, and the liber and page of its record. There was no hint or suggestion in the policy as to the nature or purport of the agreement. The defendant never spoke to the plaintiff or Robertson with reference to it. There is no evidence that either the plaintiff or Robertson ever even read the schedule in which reference was made to the agreement, and they both swear that they never did. The defendant's whole contention is that inasmuch as Robertson had the policy in his possession before he drew the contract of sale and the policy mentioned the agreement he must have intended to so draw the contract as that the title should be conveyed subject to the terms of the agreement. As well might it be claimed that he meant that the property should be conveyed subject to the unpaid taxes, because they too were mentioned in the policy. Written instruments carefully and deliberately drawn and executed are not to be transformed upon such slight and unsubstantial evidence as is presented in this case. There must be judgment for the plaintiff as prayed in the complaint, with costs and an extra allowance of seventy dollars.

Judgment for plaintiff, with costs and an extra allowance of seventy dollars.

Matter of the Estate of Frederick W. Mertens, Deceased.

(Surrogate's Court, New York County, December, 1902.)

Surrogate's Court — Accounting, as executor of one partner, of the survivor of three, the estate of the other not being represented — Payment made by an executor on his own property disallowed.

The survivor of three partners when accounting as executor of one of them, cannot, where the estate of the other of them is not represented, be forced to an accounting of the partnership affairs for the purpose of charging him as executor with moneys in excess of those admitted by him in his account to be due from him as survivor.

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He may however be charged with amounts admitted by him to have been received by him as executor from himself as survivor.

He cannot be allowed as executor water-meter charges which were a lien upon property of his testator at the time when the latter conveyed it to him, as the executor in paying these charges after the testator's death was, in effect, paying charges on his own property.

OBJECTIONS to account by the general guardian of an infant.

Meyer Auerbach, for executor.

Ashbel P. Fitch, for general guardian.

THOMAS, S. The testator, Frederick W. Mertens, had two sons, Robert E. Mertens and Frederick W. Mertens, the accounting executor. In 1892 a partnership was formed between these three, under the firm name of F. W. Mertens & Sons, for the purpose of carrying on the business of manufacturing tobacco, each copartner having an equal one-third interest in the assets and profits of the firm. In January, 1899, Robert E. Mertens died, leaving him surviving him his widow, Laura E. Mertens, and his son, Robert E. Mertens, an infant. Frederick W. Mertens, senior, died in June, 1899. The business of the firm was continued by Frederick W. Mertens, the surviving partner, and is still being conducted by him, and no general accounting of its affairs has been had by agreement of the parties or otherwise. An action is now pending in the Supreme Court for such an accounting, the plaintiff in that action being Laura E. Mertens, as administratrix of Robert E. Mertens, deceased.

In the account of the executor as filed in this court, he charges himself with a balance to the credit of the testator in the firm of F. W. Mertens & Sons, on June 20, 1899, the date of his death, $6,298.16, and also as his share of profits in business and interest on capital account, less his share of uncollected accounts, $500.86. To these items Laura E. Mertens, as general guardian of her infant son, Robert E. Mertens, filed objections, charging, in substance, that the admitted balance of amount due the testator for his interest in the assets and profits of the firm was not sufficiently large; that collectible debts due to the firm had improperly been treated as worthless, and that the good-will of the business had a

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value not accounted for. On the issues thus made much testimony was taken, and the referee made findings of fact and of law which are excepted to.

I am of the opinion that this court is without jurisdiction to determine these issues, or any of them; that the evidence given upon them must be ignored and disregarded, though not objected to, and that the findings made concerning them must be overruled and stricken out. It was proper to charge the executor with the amounts admitted by him in his account to have been received by him, as executor, from himself, as surviving partner of the firm of which the decedent had been a member. Woodruff v. Woodruff, 17 Abb. Pr. 165, 167. It was not proper, in this proceeding, to take an accounting of the partnership affairs of a firm in which the estate of Robert E. Mertens, deceased, had an interest, which estate was here entirely unrepresented, for the purpose of charging the executor, as such, with moneys in excess of the amount admitted by him to be due from himself, as surviving partner.

On the death of his two copartners, the surviving partner became the owner, at law, of the entire assets of the firm, subject to a trust duty to account to the legal representatives of his deceased copartners. No trustee can be required to account in any court, in an action or proceeding in which all of the beneficiaries of the trust are not represented.

The statutory limitation of the power of this court to determine a claim against an executor or administrator, by reason of his indebtedness to the estate, on his accounting, is found in section 2731 of the Code of Civil Procedure, as follows: "Where a contest arises between the accounting party and any of the other parties respecting property alleged to belong to the estate, but to which the accounting party lays claim either individually or as the representative of the estate, or respecting a debt, alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, the contest must, except where the claim is made in a representative capacity, in which case it may, be tried and determined in the same manner as any other issue arising in the surrogate's court."

In this case the moneys of the partnership, if any there were, were not claimed by the executor, "either individually or as the representative of the estate," but as trustee, in part, for a stranger to the proceeding. The debt, if any, was due not by the accounting

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party to the decedent, but by the accounting party as a trustee for a stranger to the record, and it was one of a class of claims which cannot be adjusted, liquidated or determined except upon principles approved by courts of equity, one of which requires that a trust estate shall not be carved into pieces and divided, without affording a hearing to each and every party in interest.

If there had only been two members of the firm, the decedent and the executor of his will, the rule would have been entirely different. In such a case the partnership accounting would have been within the jurisdiction of this court. Thomson v. Thomson, 1 Bradf. 24; Marre v. Ginochio, 2 id. 165; Becker v. Lawton, 4 Dem. 342; Matter of Saltus, 3 Abb. Ct. App. Dec. 243, 248; Hannahs v. Hannahs, 68 N. Y. 610; Matter of Laney, 50 Hun, 15; affd., 119 N. Y. 607; Matter of Dummett, 38 Misc. Rep. 477. The claim that an accounting could be had in the Surrogate's Court of the affairs of a partnership where some interest was unrepresented here, was distinctly repudiated and denied by the General Term in Woodruff v. Woodruff, 17 Abb. Pr. 165, 167.

It is conceded that no decree here made would control the decision of the Supreme Court in the pending action for an accounting. It is better that the present decision shall so be framed as to avoid a possibility of conflicting rulings.

In schedule D of the account of the executor he claims credit for $1,580.10 for a payment of that amount, made August 20, 1900, for "Water Department, Meter Bills." The seventh and eighth objections filed against the account may fairly be construed to challenge this item. Evidence was taken on the subject which was not objected to as being immaterial to the issues, and the referee passed upon the question raised on its merits, by his fourth finding of fact and his fourth conclusion of law. All of this puts a construction on the objections as being sufficient to raise the question as to whether the item was proper.

The real property of the testator upon which these Croton water charges were liens, was conveyed by the testator to the accounting executor, on or about June 1, 1899, and the finding of the referee is that the amount claimed was due at the time of the death of the testator, in the latter part of that month. They accrued before the time of the delivery of the deeds and were liens on the real property of the executor, individually. In paying these water charges the executor was cancelling liens upon his own property,

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and was not paying debts of his testator, and such payment cannot be allowed to him, and thus be made a charge upon the estate. Henderson v. Arbuckle, 54 N. Y. Super. Ct. 141; Moffat v. Henderson, 50 id. 211; Matter of Selleck, 111 N. Y. 284, 287. The conclusion of the referee allowing these payments must be reversed.

It was argued by counsel for the objectant that the referee struck out objections and exceptions taken by him, and failed to require from his adversary a decent observance of the ordinary requirements of decorous behavior. A careful inspection of the whole record satisfies me that he tried to keep counsel on both sides in order, and that his task was a difficult one. I do not find reversible error in any of his rulings, and every objection made by counsel, with much of argument and comment which might have fairly been omitted from the record, seems to have been set out at large in the stenographer's minutes.

The remaining exceptions concern findings as to matters of fact, all of which are based upon legal evidence sufficient to support them. The report is, therefore, confirmed in every respect in which I have not, in this memorandum, determined otherwise. All questions of costs are reserved until the settlement of the decree.

Decreed accordingly.

Matter of the Estate of NAPOLEON LE BRUN, Deceased.

(Surrogate's Court, New York County, December, 1902.)

Transfer tax — Remainder when taxable since L. 1899, ch. 76.

For the purposes of L. 1899, ch. 76, a constitutional enactment, a transfer is the passing of the title of a valuable interest out of and from the estate of a decedent, although the transferee is not now ascertainable, and is presently taxable however obscure and contingent ultimate vesting may be.

Accordingly held, that remainders, after a trust for a surviving daughter of a testator, appointable by her out of the corpus "to and among such persons and corporations who may be living or in existence at her death" and to any of his descendants "who may be living at her death" were presently taxable and this notwithstanding L. 1896, ch. 908, § 220, as amended by L. 1897, ch. 284, § 2.

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Misc.] Surrogate's Court, New York County, December, 1902.

APPEAL from an order assessing and fixing the transfer tax.

Murphy & Lloyd, for appellant.

Edward H. Fallows, for State Comptroller.

THOMAS, S. The decedent died July 9, 1901. By his will he gave to a trust company, to be selected by his executors, a sum of money or securities sufficient to produce a net annual income of $1,000, upon trust to pay from such income to his daughter the full and clear sum of $1,000 annually. He gave to his daughter power to give and bequeath from and after her death forty-five per cent. of the principal of this fund "to and among such persons and corporations who may be living or in existence at her death in such sums, shares and proportions, and upon such lawful trusts as she shall think proper;" and also to give and bequeath, from and after her death, the residue of said fund, or fifty-five per cent. thereof, to and among any of his descendants "who may be living at her death in such sums, shares and proportions, and upon such lawful trusts and conditions as she shall think proper."

The appraiser designated to fix the transfer tax appraised the value of the life interest of the daughter, and reported that he could not then ascertain the person or persons in whom the remainder interest would vest, and that no tax could now be imposed thereon. In the order made upon this report the remainder was not taxed, and the State Comptroller appeals.

The statute applicable to the question presented, and to this estate, is section 230 of the Tax Law, as amended by chapter 76 of the Laws of 1899, to the effect that "when property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions, whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax shall be due and payable forthwith, out of the property transferred."

Prior to the enactment of this amendment the word "transfer," as used in the Tax Law, had been determined by the courts to have

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its "ordinary legal signification, which is that the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter." Matter of Gould, 156 N. Y. 423, 428. After the passage of the amendment this definition was applied to it in Matter of Vanderbilt, 68 App. Div. 27, and Matter of Howell, 34 Misc. Rep. 432, and resulted in making the amendment inoperative, it being reasoned that a transfer without a transferee was a thing impossible. It was while the decision of the Appellate Division was controlling that the order now being reviewed was made.

The Court of Appeals, by a divided court, reversed the Vanderbilt case (Matter of Vanderbilt, 172 N. Y. 69), and imposed a tax on a remainder interest, absolutely vested in the person who was finally to take but subject to be defeated by the contingency of his dying before reaching the age of thirty-five years. Shortly after this decision I made my memorandum in Matter of Clarke, 39 Misc. Rep. 73, in which I stated, in substance, that a transfer was consummated when a remainder was vested, though subject to conditional defeat. The most recent decision of the Court of Appeals upon this subject is Matter of Brez, 172 N. Y. 609, and leaves no doubt of the meaning of the court. In that case the income of the residuary estate of the testator was directed to be paid to his sister for life, with remainder to her issue, if she should leave any. If she died leaving no issue the will provided that the income of the residuary estate should be devoted to purposes of charity or religion of the Protestant faith only, and the executors were given wide powers of selection to determine the ultimate beneficiaries. Under this will the court determined that it was the duty of the surrogate to assess a tax upon the transfer to the unknown contingent remaindermen.

The effect of these two decisions is to declare that the amendment of 1899 is constitutional and valid, and that it must be so construed as to give it force and not to defeat it; that, for the purposes of the act, a transfer is the passing of the title of a valuable interest out of or from the estate of a decedent, though the transferee is not now ascertainable, and that every such transfer is presently taxable, however obscure, contingent or nebulous the ultimate vesting of the transferred interest may be. That this construction effectuates the purpose of the Legislature is obvious, and it will also greatly simplify the administration of the collec-

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tion of the tax. The race between the lawmakers seeking to impose the tax and testators striving to postpone its collection will, on this point at least, come to an end.

I must, therefore, determine that the remainders, after the death of the life beneficiary, though not ascertainable until after the end of her life and the provisions of her last will are disclosed, are now taxable and that the order appealed from must be reversed.

In reaching this conclusion I have not overlooked the provision contained in subdivision 5 of section 220 of the Tax Law (L. 1896, ch. 908, as amd. 1897, ch. 284, § 2), to the effect that "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will." When the donee of the power under the will of this decedent shall have exercised her power of appointment, it may become a question whether the payment of the tax, now to be imposed, will or will not relieve the appointed remaindermen of the payment of any new tax, because of the transfer effected by the will of the donee of the power. It is sufficient for all of our present purposes that, within the meaning of the statute, as construed by our highest court, transfers from the estate of the decedent have been made upon which it is our duty to impose a tax.

Decreed accordingly.

Matter of the Estate of THORA SOGAARD, Deceased.

(Surrogate's Court, New York County, December, 1902.)

Surrogate's Court — Decree to be entered on the release of a surety under Code C. P., §§ 2600, 2601.

Where the surety for an administratrix cites her to show cause why he should not be released, and she files a new bond and an account of her proceedings, and he does not object to the latter nor make any affirmative application in the matter, a decree "settling"

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the account as filed should be entered and the parties interested in the estate need not be brought in by a supplementary citation and be heard.

Such a decree would not bind those not made parties to the proceeding, but may be useful as placing on record the sworn declaration of the administratrix as to the condition of the estate when the surety declined to be further bound.

PROCEEDING to procure the release of a surety of the administratrix under sections 2600, 2601, Code of Civil Procedure, as amended by Laws 1901, chapter 524.

Samuel S. Perry, for surety.

James A. Newman, for administratrix.

THOMAS, S. The petitioner is the surety of the administratrix of the decedent, and the proceeding is to procure its release as such surety under sections 2600 and 2601 of the Code of Civil Procedure, as amended by chapter 524, Laws of 1901. Up to this time the proceedings have strictly followed the statute. On the petition a citation issued which required the administratrix to show cause why the surety should not be released from responsibility on account of any future breach of the condition of the bond, and why the administratrix should not give new sureties and render and settle her account. On the return of this citation an order was made that the administratrix file a new bond, with sureties, within five days thereafter. Such a bond was filed within the time limited, and thereupon a further order or decree was made releasing the petitioner from liability upon the bond from any subsequent act or default, and requiring the administratrix to render and settle her account to and including such decree and to file such account within a time then fixed.

The administratrix has filed her account in obedience to the last-mentioned order or decree; eight days have since expired, and the retiring surety has not filed and does not desire to file any objections thereto. The question now presented is as to whether the proceeding may now be ended by a final decree declaring that the account, as filed, is "settled" within the meaning of the statute, or should it be extended by the issuance of a supplemental

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citation directed to the parties interested in the estate, and should the making of a decree be postponed until they are heard?

If such a citation is required, the administratrix is not obliged to ask for it or procure its service, since no duty is imposed upon her by the statute to institute a legal proceeding, or to demand legal relief against anyone. If the surety has a legal right to demand such a supplemental citation, he has not done so and disclaims any desire to do so.

Where an executor or administrator is required to "render and settle his account" in proceedings for a compulsory accounting under sections 2726 and 2727 of the Code of Civil Procedure, the proceeding is confined to the original parties until it is made to appear "that there is a surplus distributable to creditors or persons interested," and until the surrogate has issued a supplemental citation. If the account, as filed, is not objected to by the petitioning creditor, it is the common practice, established by many precedents, to close the proceeding by an order declaring the accounts settled accordingly.

Without determining that an account filed under section 2601, now being considered, can be litigated at the instance of the resigning surety, by the issuance of a supplemental citation to all parties in interest, in the absence of any statute expressly permitting it, I am of the opinion that, unless the surety objects to the account as filed and makes some further affirmative application, the proceeding is at an end and must be closed by a decree settling the account on the motion of the accounting executor or administrator. Such a decree will, of course, not be binding upon strangers to the proceeding, but it places upon record the sworn declaration of the administratrix as to the condition of the estate at the time when the surety ceases to be bound for future defaulting, and may, thus serve a useful purpose. The decree presented has been modified and signed.

Decreed accordingly.

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Matter of the Estate of JOHN G. LANE, Deceased.

(Surrogate's Court, New York County, December, 1902.)

Transfer tax — Sufficiency of prima facie proof that a testator stood to a legatee in the mutually acknowledged relation of a parent.

Where an executor establishes by *prima facie* evidence that his testator stood to his residuary legatee, a woman, in the mutually acknowledged relation of a parent continuously for more than ten years before his death and that such relationship began at or before her fifteenth birthday, the tax on her legacy must under L. 1898, ch. 88, § 1 be fixed at one per cent, and no more.

APPEAL from an order assessing and fixing the transfer tax.

Stephen W. Collins, for appellant.

Edward H. Fallows, for State Comptroller.

THOMAS, S. The fact that the deceased stood toward Elizabeth S. Albertson, the residuary legatee, in the mutually acknowledged relation of a parent, at least from the time of his marriage to her mother on June 29, 1879, nearly twenty years before his death, is fully established by evidence and is not disputed. At that time, Mrs. Albertson was about fifteen years and five months old, and the statute requires in order that the rate of transfer tax shall be reduced to 1 per centum, that the relationship should have begun at or before her fifteenth birthday. Tax Law of 1896, § 221, as amd. by Laws of 1898, chap. 88. For more than seven years prior to Mrs. Albertson's fifteenth birthday she and her mother were members of the household of the decedent, and, though the proof of specific acts on his part, prior to that time, acknowledging her as his child, is not very full or specific, it is entirely uncontradicted, and is sufficient. For example, George B. Borton and Susan W. Borton jointly affirm "that the said Elizabeth S. Albertson went to live with John G. Lane when she was a small child, and before she was eight years old, and then became a member of his family, and that before her fifteenth birthday the mutual relation of father and daughter existed between them, and that they

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addressed and introduced each other as such." The burden of proof rested on the executor, but nothing more was required of him than to establish the fact by evidence *prima facie* sufficient. The order appealed from will be modified by reducing the tax on the legacy to Mrs. Albertson to 1 per centum of its appraised value.

As to the second ground of appeal, the recent decision of the Court of Appeals in Matter of Jones, 172 N. Y. 575, is controlling in favor of the State.

Order affirmed, except as above modified.

Order modified and affirmed.

JOHN WELKER, Appellant, *v.* GEORGE ALLEN, Respondent.

(County Court, Genesee County, December, 1902.)

Justice's court — New trial — Justice communicating with the jury after they had retired.

A new trial should not be granted, in an action in justice's court in which the defendant succeeded, merely because the justice, while the jury were deliberating in his courtroom and after the counsel in the case and the defendant had gone home, returned to the courtroom at the request of the jury and there read them his minutes of the testimony of two witnesses, and the further fact that he by an oversight did not, as he might have done, request the plaintiff to accompany him to the courtroom is not material under the circumstances.

APPEAL from a judgment entered by E. H. Moissinac, Esq., a justice of the peace of the town of Darien, on the 29th day of January, 1902, upon the verdict of a jury, in favor of the defendant against the plaintiff, for the return of the chattel replevied, with costs amounting to $7.10.

Charles F. Wilkie, for appellant.

William H. Coon, for respondent.

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WASHBURN, J. The appellant urges that this judgment should be reversed on account of alleged error on the part of the justice in communicating with the jury after they had retired to deliberate upon their verdict. In the consideration of this question it is important that the amended return of the justice, the sole evidence relied upon to furnish the proof of the acts of the justice which are now complained of, be carefully examined. Its full text, omitting the formal parts, is as follows: "That about 9 o'clock P. M. after the jury dispatched the officer, A. E. Amlinger, who was in charge, to the hotel across the road from courtroom, where I was in waiting, requesting my presence, all the attorneys for both parties having returned to their respective homes on the 7 o'clock P. M. train, the defendant also having retired to his home. The justice overlooked the facts that the plaintiff John Welker was at the hotel at the time, and in that oversight failed to seek him and ask his presence when the jury requested mine. On entering the courtroom and while I was present, there was only the officer there besides the jury. I asked the jury if they had agreed. They answered they had not, and asked me to read to them the evidence as given in the minutes of John Welker, the plaintiff, and Charles Hill, a witness, which I did, and immediately retired from their presence. There was no conversation held by or between the jury and the justice. No questions asked or answered while in their presence, and as above set forth I immediately retired from their presence."

After an examination of all of the cases cited by either of the parties upon this appeal, it seems to me that there is a material distinction between the facts shown in this return and those appearing in any case in which a judgment has been reversed for the cause now assigned. In Taylor v. Betsford, 13 Johns. 487 (1816), the justice went into the room with the jury "privately and apart from the parties" and the judgment was reversed. Bunn v. Croul, 10 Johns. 239 (1813), Moody v. Pomeroy, 4 Den. 115 (1847), Valentine v. Kelly, 26 N. Y. St. Repr. 481 (1889), Gibbons v. Van Aystyne, 29 id. 461 (1890), People v. Linzey, 79 Hun, 23 (1894), High v. Chick, 81 id. 100 (1894), and Abbott v. Hockenberger, 31 Misc. Rep. 587 (1900), were all similar in the facts appearing to Taylor v. Betsford, and were decided upon the same principle. All of these cases arose in justice's court. In Benson v. Clark, 1 Cow. 258 (1823), Neil v. Abel, 24 Wend.

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185 (1849), Watertown Bank. & Loan Co. v. Mix, 51 N. Y. 558 (1873), Plunkett v. Appleton, 51 How. Pr. 469 (1876), and Kehrley v. Shafer, 92 Hun, 196 (1895), judgments were reversed because of written communications sent by the justice or judge to the jury after they had retired and without the assent of the parties, some of the cases originating in justice's court, and others in courts of record. The language adopted by the Court of Appeals in Watertown Bank. & Loan Co. v. Mix, that communications to the jury should "take place openly in court or with the express assent of the parties," should be noted. In Mitchell v. Carter, 14 Hun, 448 (1878), the judgment was reversed because the jury during the deliberations took occasion to read the minutes of the trial judge, found in the courtroom.

The keynote of all these cases is, it seems to me, the refusal of the courts to permit any private communication with the jury by the justice, after the case has been submitted, unless by express consent of the parties, and in their condemnation of such acts the courts have made no discrimination between those cases where it has not appeared what took place between the justice and the jury and those where it has been proven that nothing improper or injurious to either party transpired. See opinion in Abbott v. Hockenberger, *supra,* citing the language of the cases on this point.

The material difference between the cases cited and the one now under consideration is that in the present case the communication between the justice and the jury was not, as far as appears, private or had in any other than the proper manner. The attorneys in the case had returned to their homes by a train leaving two hours before the jury sent for the justice. One of the parties had gone home. The justice went, he says, to the *courtroom,* and at the request of the jury read the evidence of the appellant, and of one of the witnesses for the respondent, as contained in his minutes. The language of Justice Vann, at present one of the judges of the Court of Appeals in this State, in Wiggins v. Downer, 67 How. Pr. 65 (1884), seems peculiarly applicable: "The trial of a case does not end until a verdict is had, because if there is no verdict, in the eye of the law there is no trial. Therefore counsel who leave court before the verdict is announced, leave before the trial is finished. They do this at their peril, and take the risk of further instructions being given, openly from the

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bench, so long as court is in session, and the jury still out. While, as a matter of courtesy, but not as a matter of right, it is customary to send for counsel upon the return of the jury for information of any kind; when, by the act of counsel, it is impracticable to do so, the omission cannot be urged as a ground for a new trial. To hold otherwise would enable counsel, either by negligence or design, to compel the court to discharge the jury before they had given the case enough consideration, or to confine them in the jury-room until it suited the convenience or inclination of counsel to come into court when further instructions might be given, and the jury could intelligently resume their deliberations. No evil can result from this rule, except that the court would not have the aid of suggestions from counsel, but this would cause less inconvenience than to suspend business."

The facts in the Wiggins case were very similar to those existing here. There the trial was had at circuit. The jury came in at nine o'clock in the evening and received certain instructions in open court. Neither party was present in person or by counsel, and one of the counsel had left the city where the court was in session. The court refused to set the verdict aside. In this case it was suggested by counsel upon the argument that the courtroom and the jury-room were identical, there being no separate room available for the deliberations of the jury. This we know to be frequently the case in justices' courts, and it may then be said that the room remains the courtroom so long as it is open to the public generally, becoming the jury-room when the public retire and the jury are left to commence their deliberations. In like manner, it again becomes the courtroom when the doors are thrown open to the public and the justice enters, to receive the verdict or to communicate with the jury, accompanied by such others, if any, as may desire to be present, the room being regarded as open for that purpose. If what is then said and done between justice and jury is in itself proper, no irregularity exists; if it is erroneous and prejudicial to the appellant, the judgment entered on the verdict will be reversed. Wheeler v. Sweet, 137 N. Y. 438.

If, on the other hand, the room is closed to the public it makes no difference how innocent in its nature the communication may have been, and a verdict afterward rendered will not be allowed to stand.

I am satisfied that upon the record before me in this case the

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communication between the justice and jury must be regarded as having been had in open court, and not having been of a nature prejudicial to the appellant, the judgment entered on the verdict must stand. That the justice failed to request the presence of the appellant, who alone of all the parties and attorneys interested in the case was near at hand at the time, is not opposed to this view of the case. The justice says in his return that this was due solely to an oversight on his part, showing that he recognized the right of the parties to be present and that the courtroom was open for that purpose if they wished to avail themselves of the opportunity to enter. It was not incumbent on the justice to seek out the public and invite their attendance in the courtroom, so long as the latter was open for that purpose to any who desired to enter.

I have examined the points raised by appellant's counsel as to evidence offered by plaintiff and excluded upon defendant's objection, and find no error requiring a reversal. The judgment must be affirmed, with costs.

Judgment affirmed, with costs.

LAZARUS WEIL, BERTHOLD WEIL and BENJAMIN L. WEIL, Appellants, v. THE UNIQUE ELECTRIC DEVICE CO., Respondent.

(City Court of New York, General Term, December, 1902.)

Pleading — Separate defense when permissible — Entire contract of sale — Effect, on duty to accept further deliveries, of a failure to rescind on the first delivery, objected to — Waiver of tender.

Where a complaint for the price alleges a single sale of 3,000 battery cases, delivery, acceptance and payment of 1,000, tender and refusal of the balance, and the answer denies everything except the making of the contract, the defendant is entitled to interpose as a separate defense its claim that the sale was by sample and the 1,000 cases inferior to it, and this because it could not show these facts, constituting new matter, under the denial.

The court, however, held that the separate defense did not set up facts sufficient to constitute a defense, considering that, as the contract was entire and executory and the defendant had not rescinded and restored at the time of the delivery of the 1,000 cases, it had

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acquiesced in the quality of that lot and must accept the balance if equal in quality.

Tender of the balance is waived where the vendee notifies the vendor, upon acceptance of the 1,000 cases, that it will not accept future deliveries unless equal to the sample.

APPEAL from an interlocutory judgment overruling a demurrer to a separate defense pleaded by the defendant.

Felix H. Levy (M. L. Halff, of counsel), for appellants.

Bennet & Silverman (William S. Bennet, of counsel), for respondent.

CONLAN, J. The action is to recover the stipulated purchase price of certain merchandise sold defendant. The complaint alleges the sale of 3,000 battery cases, the delivery and acceptance of a payment for 1,000 of that number, and a subsequent tender of the balance thereof, acceptance of which was refused. The answer admits the making of the contract, but denies all other material allegations of the complaint. As a separate defense it repeats the denials in question and alleges that defendant agreed to purchase the cases in question at the price stipulated, provided that said cases when delivered were equal in quality to sample exhibited the defendant at the time of purchase; that 1,000 of said cases were thereafter delivered on account of said sale, but that they failed to equal said sample in many particulars and were not in accordance with the agreement; that defendant accepted same but notified plaintiffs that it would refuse to take the balance of the contract number unless they complied with the sample, and that none of the same has been delivered or tendered. Plaintiffs demurred to this separate defense upon the ground that it is insufficient in law upon the face thereof. From an interlocutory judgment overruling the same this appeal is taken.

The demurrer can only be sustained in the event that the "defense" in question fails to set forth "new matter," that is, matter not embraced within the issue raised, or which might be raised by a denial, and, therefore, not provable under a denial. The rule is well settled that under a general denial the defendant may give

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evidence tending to disprove any fact which plaintiff is bound to prove in order to recover, and that, if other facts are relied upon as a defense, the defendant, in order to avail himself of them, must plead them. Milbank v. Jones, 127 N. Y. 376.

The matter in avoidance here can hardly be said to be provable under a denial. If plaintiffs prove the original order and the delivery and acceptance of the thousand cases, and tender of the balance, would it be competent to show that the sale was by sample, and that the goods tendered were inferior thereto? I think not, and that is the test determinable of this question. The authorities cited by plaintiff, principally Durst v. Brooklyn Heights R. R. Co., 33 Misc. Rep. 124, and inferentially, Staten Island M. R. R. Co. v. Hinchcliffe, 34 id. 624, and the case of Levy v. Metropolitan St. R. Co., 34 id. 220, have been disapproved in Donovan v. Main, 74 App. Div. 44.

To hold under the circumstances that the separate defense was demurrable for the reason assigned requires a construction altogether too rigid and narrow. I am of the opinion, however, that the demurrer must be sustained, for the reason that the defense in question fails to state facts sufficient to constitute a defense. The sale in question, according to defendant, was an executory one, and when it received the first lot of a thousand cases and found them not up to sample, instead of accepting and paying therefor, it was its duty to rescind the sale and return, or offer to return, the goods; its failure so to do was an acquiescence on its part of the quality of the cases in question. Hargous v. Stone, 5 N. Y. 86; Copley Iron Co. v. Pope, 108 id. 236.

The contract then being an entire one, the duty was incumbent on defendant to receive the balance of the order, provided they were of similar quality to the lot already delivered. The notice to plaintiffs that it would not accept the remaining 2,000 cases unless they complied with the sample was, under the circumstances, a breach of contract on defendant's part, and operated as a waiver of tender. Windmuller v. Pope, 107 N. Y. 675.

Notwithstanding the provisions of section 519 of the Code of Civil Procedure, that the allegations of a pleading must be liberally construed with a view to substantial justice between the parties, and the principle that pleadings against demurrer will be deemed to allege whatever can be implied from its statements by fair and reasonable intendment (Kain v. Larkin, 141 N. Y. 151),

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I am inclined to the opinion that the demurrer should be sustained. The interlocutory judgment appealed from should, therefore, be reversed, with costs, and the demurrer sustained, with costs, with leave to defendant to serve an amended answer on payment of said costs.

McCarthy and Seabury, JJ., concur.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to defendant to serve an amended answer on payment of costs.

Charles T. Root, Respondent, *v.* Daniel J. Kelley, Appellant.

(City Court of New York, General Term, December, 1902.)

Payment — Merchandise as a payment of a promissory note — Construction of a contract.

A series of five promissory notes, equal in amount and payable respectively in twelve, eighteen, twenty-four, thirty and thirty-six months, was executed under an agreement of the parties that for each five hundred dollars "paid" by the maker to the payee on account of the principal of the notes, in the order of their maturity, the payee should deliver to the maker certain shares of stock. Before the eighteen months' note matured the maker received from the payee merchandise sufficient to pay it but, instead of applying the merchandise to the payment of that note, he, against the maker's protest, applied it to the payment of and satisfied the thirty-six months' note. To an action by the payee on the eighteen months' note the maker interposed the defense of payment.

Held, that payment need not be made in money only.

That it was erroneous for the trial court to refuse to submit to the jury the question whether the maker ever acquiesced in the action of the payee in the application of the merchandise to the thirty-six months' note.

Appeal by defendant from a judgment in favor of plaintiff, entered by direction of the court at Trial Term, and from an order denying defendant's motion for a new trial.

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Einstein, Townsend, Guiterman & Shearn (C. J. Shearn, of counsel), for appellant.

Ludlow & McKnight (William G. McKnight, of counsel), for respondent.

DELEHANTY, J. The action is to recover a balance due upon a promissory note, dated September 15, 1899, payable eighteen months after date, made by defendant to the order of plaintiff. The note was the second of a series of five, each of similar date and amount, maturing respectively in twelve, eighteen, twenty-four, thirty and thirty-six months, delivered pursuant to a written agreement and for a valuable consideration. The clause of the agreement defining the rights and liabilities of the respective parties thereto upon the payment of said notes, and which is pertinent here, is as follows: Clause second. "That for each five hundred dollars paid by the party of the second part to the party of the first part on account of the principal of said notes, in the order of their maturity, the party of the first part shall deliver to the party of the second part five hundred and fourteen shares of the common stock of said American Queen, and five hundred and fifty shares of the preferred stock of said American Queen."

The note in suit is the eighteen months' one, which matured on March 15, 1901. Prior to its maturity plaintiff received from defendant merchandise of a value sufficient to cancel the same. Instead, however, of applying this merchandise in satisfaction of said note when due, plaintiff applied it to the last note of the series, not due until September 15, 1902, a year and a half later. It is not disputed that defendant protested to plaintiff at this procedure, and on receipt of the thirty-six months' note returned the same to him, with a request for a transmission of the note next due, namely, the one in suit. Nor is there any claim that the plaintiff did not send back to defendant, as testified, the thirty-six months' note, with the statement, "I have cancelled the first and the last (notes), and I will take up the intermediate ones alternately." Defendant testified, however, that upon receipt of this communication, he notified plaintiff that he did not agree that these notes be taken up out of their regular order; but plaintiff's testimony is to the effect that he had no recollection of ever receiving such a notice. At the proper stages of the trial defendant requested the court to dismiss the complaint and for the direction of a verdict,

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which was denied, but the court did direct a verdict for the plaintiff for the full amount claimed, and, from the judgment entered thereon and from an order denying defendant's motion for a new trial, this appeal is taken.

The defense pleaded and urged upon the trial, without objection, was payment, and I think, in view of the record, that at least there should have been submitted to the jury, as requested by defendant, the question whether he ever acquiesced in the action of plaintiff in the application of the merchandise in question to the satisfaction of the last note. The defense of "payment," in its most restricted sense, is the discharge in money of a sum due (Bouvier L. Dict.); but in its most general acceptation it is the fulfillment of a promise, the performance of an agreement, the accomplishment of every obligation, whether it consist in giving or doing. It is not a technical term and has been imported into law proceedings from the exchange, and not from law treatises. To prove payment the party pleading it must show the payment of money, or something accepted in its stead. Bouvier L. Dict.; 2 Greenl. Ev. (13th ed.), § 516.

To pay is to discharge a debt, to deliver a creditor the value of a debt, either in money or goods, to his acceptance, by which the debt is discharged. Beals v. Home Ins. Co., 36 N. Y. 522, 527.

The undisputed evidence is that before the maturity of the note sued upon plaintiff received from defendant merchandise valued at an amount equal to the face value of said note, and that thereupon he satisfied the last note instead of the one in suit, which was the one next to mature. This, in my opinion, was in violation of the agreement above referred to, unless there was a mutual waiver of the provisions thereof in respect thereto. That was a disputed question upon the trial, and the defendant was entitled to have the jury pass upon it, especially in view of his testimony that when he delivered the merchandise to plaintiff, he told him to apply it on the notes as they fell due, as per the contract.

It follows, therefore, that the judgment and order appealed from must be reversed and a new trial granted, with costs to appellant to abide the event.

McCarthy and Seabury, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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OMAR POWELL and DANIEL L. CADY, Respondents, *v.* NATHAN BURSKY, Appellant, Impleaded with MAX HOROWITZ, Defendant.

(City Court of New York, General Term, December, 1902.)

Surety — Liability on a bond given for an attachment later vacated — Invalidity of separate defenses alleging the misfeasance of the foreign attorneys of his principals and a pending appeal from the order vacating the attachment.

Where local attorneys, assignees of their non-resident clients' rights under an attachment issued against them but afterwards vacated and an appeal from the order vacating abandoned, as the attorneys allege, thereafter sue the surety, on the undertaking given to procure the attachment, to recover the value of their services to their clients, it cannot avail him to set up by a separate defense that foreign attorneys of the plaintiffs in the attachment action were so derelict in serving on the said non-residents the summons therein that the attachment was vacated, nor is it a defense to him to allege that the appeal from the order vacating is still pending where he does not also allege a stay of proceedings or that in substance.

APPEAL from an interlocutory judgment, entered upon a decision sustaining a demurrer.

Baggott & Ryall (George Ryall, of counsel), for appellant.

William K. Hawkins, for respondents.

SEABURY, J. This is an appeal from a judgment sustaining plaintiffs' demurrer to the alleged separate defense of the defendant Bursky. The action is brought by the plaintiffs who are counselors-at-law to recover the alleged reasonable value of services rendered by them to their clients. The plaintiffs were the attorneys for Louis Isaacs and Max Isaacs, who were defendants in an action brought against them by Philip Shapiro and Mannes Rose in the Supreme Court of this State. The defendants in this action were the sureties named in and who executed an undertaking on an attachment obtained in the action brought by Shapiro & Rose

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against L. and M. Isaacs. The complaint, after alleging various facts in reference to the attachment in the former action, and the assignment by L. and M. Isaacs of their rights under the undertaking to the plaintiffs, alleges that an order was made, vacating the attachment, from which Shapiro & Rose appealed to the Appellate Division. It alleges the plaintiffs in this action as attorneys for L. and M. Isaacs moved to dismiss said appeal because of the failure of Shapiro & Rose to serve the printed papers on appeal and alleges the decision of the Appellate Division permitting Shapiro & Rose to apply to the Special Term for permission to serve and file the printed papers upon payment of costs within three days of the entry of said order; that the order was entered January 17, 1902, and that the plaintiffs in that action failed to pay the costs and failed to move for leave to open their default as provided in the order of the Appellate Division "and have abandoned said appeal."

The defendant Bursky in his answer as a separate defense alleges the sale and delivery by Shapiro & Rose to L. and M. Isaac of certain goods and, after alleging the facts in reference to the attachment, alleges that Shapiro & Rose sent to W. W. & J. R. Watts, attorneys of Louisville, Ky., copies of the summons and complaint and of the order directing service, with instructions to them to serve the Isaacs with the same and that said Messrs. Watts in violation of their said instructions served the summons one day too late so as to enable the attachment to be vacated. The answer also alleges that the attachment obtained in said action was vacated, and that the appeal from said order vacating it is pending and undetermined. To this alleged defense the plaintiffs in this action demurred upon the ground that it did not state facts sufficient to constitute a defense. The court at Special Term sustained the demurrer. From the interlocutory judgment entered upon such decision this appeal is taken.

The alleged separate defense as pleaded in the answer is wholly insufficient. If the attorneys of Shapiro & Rose, W. W. & J. R. Watts, committed a wrong in delaying the service of the papers that were sent to them for service, it does not avail the defendant Bursky as against the plaintiffs in this action. If these attorneys committed an actionable breach of duty, it may have given Shapiro & Rose an action against them, but it certainly does not afford a

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defense to Bursky who is sued as surety upon an undertaking which he entered into in that action.

The alleged fact that an appeal is still pending from the order vacating the attachment is not a defense to this action. This question was squarely passed upon in Feiber v. Smith, 6 N. Y. Supp. 446, where it was held that a defense that an appeal had been taken from an order vacating the attachment which was still undetermined, must, in order to be good, allege that a stay of proceedings has been ordered, or such other facts in connection with it as legally would accomplish that result. The appellant not only attempts to defend the sufficiency of his alleged defense, but tries to save it by challenging the sufficiency of the complaint. As a demurrer searches the record for the first fault in pleading, we have examined the allegations of the complaint. The complaint alleges that the appeal from the order vacating the attachment has been abandoned by the defendant. The defendant objects that this allegation is a mere conclusion of law and that the plaintiffs should plead the facts showing the abandonment. We have seen, however, that it has been held that the pendency of such an appeal is not a good defense to the action, nor are allegations of facts showing the abandonment of the appeal essential allegations of the complaint. The complaint states a good cause of action and the defense is clearly insufficient. The judgment sustaining the demurrer is affirmed, with costs.

CONLAN, J., concurs.

Judgment affirmed, with costs.

SAUL ELLNER, Respondent, *v.* BRIGGS PRIESTLEY and WILLIAM E. B. PRIESTLEY, Appellants.

(City Court of New York, General Term, December, 1902.)

Principal and agent — When a mere selling agent is not authorized to warrant the quality of the goods.

Where it is not shown that it is a custom of a trade for a mere selling agent to warrant the quality of the goods he sells and there is no proof that his principals, manufacturers of the goods, have authorized him to warrant quality, his statement to a vendee that

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the goods sold him by the agent are "all wool" does not bind his principals.

APPEAL from a judgment, entered upon a verdict of a jury, in favor of the plaintiff, and from an order denying a motion for a new trial.

Stickney, Spencer & Ordway (M. Edward Kelley, of counsel), for appellants.

Einstein & Townsend (M. S. Guiterman, of counsel), for respondent.

SEABURY, J. This action was brought to recover damages for a breach of an alleged express warranty. The complaint alleges that the defendants sold certain goods to the plaintiff upon the representation and warranty by the defendants that the goods, which were known as "Zebeline," were "all wool." The defendants admit the sale of the goods, but deny that the cloth was sold upon any representation or warranty by them as to its quality. The goods were sold to the plaintiff through a traveling salesman in the employ of the defendants. Upon the trial it was proved, over the exception of the defendants, that the traveling salesman, in making the sale, stated that the goods were "absolutely all wool." This was denied by the agent and the defendants were not allowed to prove that their agent was not authorized to make such representations or to warrant the quality of the goods. To the exclusion of this evidence the defendants duly excepted. No evidence was offered by the plaintiff to show that the defendants' agent was authorized by his principals to warrant the quality of the goods, or that it was customary for agents engaged in selling such goods to warrant as to their quality. The trial justice charged the jury "that the law is that an agent's power to sell carried with it, as against the principal and in favor of the purchaser, the authority to warrant in regard to the material." This portion of the charge was duly excepted to by the defendants. The question presented upon this appeal is whether an agent employed to sell goods can give a warranty as to their quality which will bind his principal, when it is not shown that it was usual for the agent to warrant the quality in the sale of goods of this character, or that the agent was authorized by his principals

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to warrant the quality of the goods. We think that the opinion in the case of Cafre v. Lockwood, 22 App. Div. 11, 13, presents a direct answer to this specific question. In that case, Mr. Justice Rumsey said: "Where a contract for sale is made through an agent of the seller, there is no implied authority on the part of the agent to warrant the quality of the goods unless it shall be made to appear that it was the usual custom in sales of goods of that kind for an agent to warrant them, or actual authority was given to him for that purpose." It is true that an agent authorized to sell property, in the absence of any express limitation of his powers, is authorized to make any declaration in regard to the property, or to do any act which may be found necessary to make a sale and which is usual and incidental thereto. But as was said in Wait v. Borne, 123 N. Y. 592: "It must be usual for the agent to have power to warrant in order to carry out the object and to sell the article confided to him for sale before the law will imply such power." In this case no evidence was offered to show that such a practice was usual in selling the goods in question and, therefore, no right to warrant as to their quality can arise from implication. The evidence here discloses merely that the agent had a naked power to sell and not only is it not shown that it was usual for the agent selling such goods to warrant as to quality or that the agent had actual authority to warrant, but evidence was excluded, the purpose of which was to show that the agent was not authorized to warrant the quality of the goods. The defendants being the manufacturers of the goods sold would, probably, be held by implication to have warranted that they were free from any latent defect arising out of the process of manufacture, and that they would answer the purpose for which they were specifically designed. Reynolds v. Mayor, Lane & Co., 39 App. Div. 218–221.

This rule cannot, however, be applied in this case to sustain the verdict rendered. The goods sold were not subject to any latent defect arising out of the process of manufacture, nor were they unfit for the purpose for which they were specially designed. Here the agent of the defendants was authorized merely to sell the goods. So far as the evidence shows he was without actual authority to warrant as to the quality of the goods nor was the giving of such a warranty shown to be in accord with the usual practice of agents selling such goods. Such a warrant, given un-

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der such circumstances, was not binding upon the principal. Wait v. Borne, 123 N. Y. 592; Smith v. Tracy, 36 id. 79; Cafre v. Lockwood, 22 App. Div. 11; Reynolds v. Mayor, Lane & Co., 39 id. 218.

The judgment is reversed and a new trial ordered, with costs to the appellants to abide the event.

CONLAN, J., concurs.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

GEORGE FORBES, Respondent, *v.* ALICE L. M. WHEELER, as Administratrix, Etc., of GEORGE A. WHEELER, Deceased, Appellant.

(City Court of New York, General Term, December, 1902.)

Account stated — When established — Implied promise to pay the balance due — Payment must be pleaded.

Where a creditor states, in the presence of his debtor, that there has been a settlement of their differences and that the debtor has agreed to give him an assignment of a claim, which the debtor holds against a third party, for $1,670, and the debtor says nothing, an account stated exists between the parties entitling the creditor, *prima facie*, to recover $1,670.

The debtor need not promise to pay this amount as the law implies such a promise from the admission of a balance due.

Payment, being an affirmative defense, must be pleaded to be made available.

APPEAL from a judgment, entered upon the decision of the trial justice in a trial had before him without a jury.

Purdy, Squire & Rowe (James W. Purdy, Jr., of counsel), for appellant.

Leslie & Minor (H. K. Coddington and Warren Leslie, of counsel), for respondent.

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SEABURY, J. This is an appeal from a judgment, entered in favor of the plaintiff on the decision of the trial justice before whom the case was tried without a jury. The action was upon an account stated and the contention of the defendant is that the evidence did not prove the existence of such an account. The complaint alleges that during the life of George A. Wheeler, the plaintiff loaned and advanced to him various sums of money, and that Wheeler made several payments on account of the sums so advanced and that an account was stated between the plaintiff and Wheeler, and that upon said statement a balance of $1,670.50 was found to be due to the plaintiff from Wheeler. The complaint also alleges the promise of Wheeler to pay this sum, his death and the granting of letters of administration to the defendant. A witness called on behalf of the plaintiff testified that he was present in a room where Wheeler and the plaintiff were holding a conversation, that he could not hear the conversation, but that at its termination the plaintiff called to him, and in the presence of Wheeler stated that he and Mr. Wheeler had settled their differences; that he had a paper in his hand and added: "Mr. Wheeler is to send me an assignment for that amount," which amount the witness testified was $1,670. The paper which the plaintiff had in his hand during this conversation was an assignment by Wheeler to the plaintiff of a claim which he had against the city of New York for $1,670. This was the only evidence offered, and upon this evidence the trial justice found for the plaintiff.

It is to be noted that the evidence in support of the plaintiff's claim was that a statement had been made in the presence of Wheeler that he had settled his differences with the plaintiff, and that he would send him an assignment for the sum of $1,670. The counsel for the appellant argues that the evidence shows merely that Wheeler promised, not to pay the debt of the plaintiff, but merely that he would give the plaintiff an assignment of a claim which he had against the city, amounting to $1,670. In order, however, to constitute an account stated it is not essential that there should be a direct promise to pay the debt. If there is a balance admitted to be due the law implies a promise to pay it. In order to constitute an account stated there must be either an express or implied admission of a balance due from one party to the other. From this admission of the balance due, the law

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implies a promise to pay. It is not necessary that the agreement be in writing, but there must be such an assent as can reasonably be implied from the existing circumstances. Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 289; Schutz v. Morette, 146 id. 137. As was said in the case of Eames Vacuum Brake Co., *supra:* "Their minds must meet in making the agreement, the same as in other agreements. It need not be by direct and express assent, but such assent may be implied from the circumstances. If one party presents his account to the other and the latter makes no objection it may be inferred that he is satisfied with and assents to it as correct." The very statement of the account and admission of the balance implies a promise in law to pay it. It has been held that a bond or mortgage or a promissory note given on a settlement of accounts is *prima facie* evidence of the amount due. De Mott v. Benson, 4 Edw. Ch. 297; Dutcher v. Porter, 63 Barb. 15; Treadwell v. Abrams, 15 How. Pr. 219; Sherman v. McIntyre, 7 Hun, 592.

In the case at bar, the statement was made in the presence of the debtor that there had been a settlement of their differences and that the debtor had agreed to give him an assignment of a claim which he had against the city for $1,670. These facts, in our judgment, are sufficient to establish an implied assent by the debtor that $1,670 was the amount of his indebtedness to the plaintiff. The debtor having assented to the amount the law implies a promise upon his part to pay this sum.

Payment being an affirmative defense must be specially pleaded to be available and the pleadings in this case do not set up the plea of payment. It was not competent to prove payment under the pleadings as drawn. The defendant admits this rule, but relies upon the contention that as Wheeler had carried out his agreement and given the promised assignment, the court cannot assume that Wheeler did not pay what he agreed to pay. We do not think that this view of the case is tenable. The account stated exists not by virtue of the promise of Wheeler to pay the debt, but by reason of the implied promise which the law presumes from his admission as to the amount of his indebtedness. If the debt stated to be due was paid the defendant should have pleaded payment and offered proof of payment upon the trial. In the absence of such a plea the court would not have been justified in assuming that Wheeler paid the debt. The account

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stated having been sufficiently proved and there being no evidence of payment, the decision of the trial justice must be affirmed.

Judgment is affirmed, with costs.

CONLAN and MCCARTHY, JJ., concur.

Judgment affirmed, with costs.

GEORGE F. NEWLAND, Trustee, Appellant, *v.* LUDWIG ZODIKOW, Respondent.

(City Court of New York, General Term, December, 1902.)

Pleading — Rule to determine whether an action is individual or representative.

Where the complaint clearly shows that the plaintiff is suing in a representative capacity as trustee of a bankrupt, the fact that, in the captions of both the summons and the complaint, his name is followed by the word "trustee" and not by the words "as trustee" is not fatal to the action as a representative one and this under the rule that the title and the pleadings may be considered together in order to ascertain the true nature of the action and that it will be treated as individual or representative, as disclosed upon an inspection of the whole record.

APPEAL from a judgment dismissing the complaint.

Theodore N. Ripsom, for appellant.

Goldfogle, Cohn & Lind (Alfred D. Lind, of counsel), for respondent.

SEABURY, J. The action was brought against the defendant in the name of "George F. Newlands Trustee" as plaintiff. The summons and complaint were both entitled in this manner. After the caption, the complaint shows that "George F. Newlands, the plaintiff above named appearing by John Jay McKelvey his attorney complains of the defendant," etc. The allegations con-

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tained in the body of the complaint clearly set forth the appointment of George F. Newlands as trustee in bankruptcy of Eleanor T. Summer and that said Newlands duly accepted said trust and thereafter qualified as such trustee. The other allegations of the complaint clearly show that the cause of action therein stated was to the said Newlands in his representative capacity and not individually. Upon the trial after the jury had been impaneled the defendant's counsel moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action in favor of the plaintiff. This motion was granted, subject to the exception of the plaintiff, and judgment was entered dismissing the complaint. From the judgment so entered, the plaintiff appeals. The respondent contends that as the plaintiff in the title of the summons and complaint is designated simply "Trustee" and does not sue "as" trustee, that the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff. It is true that an adherence to correct rules of pleading requires that where persons sue or are sued in a representative capacity the title should indicate that the suit is brought by or against them in their representative capacity. When a person sues as an executor, trustee or assignee the word "as" should not be omitted from the title, but should follow the person's name. When the word "as" is omitted and the averments of the complaint do not show that the action is by or against parties in their representative capacity the defect of omitting the word "as" or a description of representative character is fatal and the addition of the word "trustee," "executor" or "assignee," etc., is merely *descriptio personæ*. But when it appears from averments of the complaint that the action is by or against parties in their representative capacity such a defect as the omission of the word "as" or a description of representative capacity is cured. Bryant's Code Pl. 185; Beers v. Shannon, 73 N. Y. 292; State v. Bartlett, 68 Mo. 581.

The test by which to determine when an action is deemed to be brought in favor of or against a party as an individual, and when in favor of or against him in a representative capacity was considered in First Nat. Bank v. Shuler, 153 N. Y. 163, 173, when the court, through Andrews, Ch. J., said "that the title and pleadings may be considered together to ascertain the true nature of the action, and the action will be treated as an indi-

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vidual or representative one, as disclosed upon an inspection of the whole record."

Applying this clear test to the determination of the question here presented and viewing not only the title but the whole complaint, we think it is plain that the action should be treated as a representative one. From this conclusion it follows that the judgment appealed from must be reversed, with costs to the appellant to abide the event.

CONLAN, J., concurs.

Judgment reversed, with costs to appellant to abide event.

MICHAEL JAEGER, as Administrator, Etc., Plaintiff, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, Kings Special Term for Trials, January, 1903.)

Pleading — Scope of a demurrer — Requisites of a denial — Frivolous defence — Judgment on demurrer.

Where an answer consists of two parts, first, a general denial and, second, matter apparently pleaded as a defence, a demurrer "to the defence set up in the answer" upon the ground that upon its face it is insufficient in law aims at the new matter and does not and cannot aim at the general denial.

However inconsistent with the allegations of the complaint those of a defence may be, they cannot be accepted in lieu of the formal denial required by the Code of Civil Procedure.

A denial must be stated separately and not be mingled with a defence.

Where the complaint is for money paid by mutual mistake, an allegation, in defence, that the payment was not made under duress and was voluntary, is frivolous.

Where the only issue raised by the answer is that raised by the general denial, the demurrer must be sustained as it cannot lawfully be overruled and the plaintiff be remitted to a motion for judgment on the defence as frivolous or to strike it out as irrelevant or redundant.

TRIAL of an issue of law raised by a demurrer to a defence.

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Henry Cooper for plaintiff.

Samuel K. Probasco for defendant.

GAYNOR, J.: The complaint is in substance that by a mutual mistake of fact the plaintiff's intestate paid to the defendant and the defendant received of her a certain sum as and for a tax which had been levied against her real estate, but which had in fact never been levied against it.

The answer is in two paragraphs, as follows:

"The defendant answering the amended complaint of the plaintiff denies any knowledge or information sufficient to form a belief as to the allegations of the complaint numbered, First, Second, Third, Fourth, Fifth, Sixth and Seventh.

"Further answering this defendant alleges that *if a payment was made* as alleged in paragraph numbered Third of the complaint herein that said payment *if made* was a voluntary payment and not made under duress."

The literary character of this answer is too apparent to need to be pointed out. The verbosity of the denial in the first paragraph becomes more apparent when it is stated that the complaint consists of seven numbered paragraphs. To deny "each and every allegation in the complaint contained", which is the prescribed form, was altogether too plain and simple for use. The objection now made to the denial is that it is in gross, instead of being of each allegation, as prescribed by the Code of Civil Procedure.

The demurrer is in so many words to "the defence set up in the answer herein, upon the ground that as it appears upon the face thereof it is insufficient in law."

Counsel on both sides, however, treat this as a demurrer to the whole answer, instead of to "the defence set up in the answer." "The answer is demurred to on the ground that it is insufficient in law on the face thereof", says the brief for the plaintiff; and "This is a demurrer to an answer as not being sufficient in law", says the brief for the defendant; and on this basis the argument of each side is carried out.

The answer, as has been seen, consists of two parts, *first*, a general denial, and, *second*, matter apparently pleaded as a defence. The position of each side that the demurrer must be taken to be to

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the whole answer is the outcome of a recent statement in an opinion that in the terminology and nomenclature of pleading a "denial" is a "defence" (Staten Island M. R. R. Co. v. Hinchcliffe, 170 N. Y. p. 481). The premise being accepted that a "denial" is a "defence", this demurrer though in terms to "the defence set up in the answer" would, I suppose, have to be deemed to aim at the "denial" in the answer, as much as at the further answer by way of a defence.

Taking this view of the scope of the demurrer, it would have to be overruled if the denial be sufficient in law. But, with due submission to things actually decided, and without being unduly influenced by mere expressions in opinions, must such a view be taken of it? Is a "denial" a "defence" in the terminology and nomenclature of pleading, and must, therefore, a demurrer to "the defence set up in the answer" be deemed a demurrer to the denial set up in the answer?

Section 500 of the Code of Civil Procedure provides that an answer must contain (1) a general or specific denial of each allegation of the complaint controverted, and (2) a statement of any new matter (i. e., matter which cannot be proved under a denial) constituting a defence or counterclaim. Here we plainly have three terms used, each meaning a different thing, viz., "denial", "defence" and "counterclaim". I suppose that in this terminology a "denial" is no more to be called a "defence" than it is to be called a "counterclaim".

And section 494 provides that the plaintiff may demur to a "defence" or a "counterclaim", on the ground that it is insufficient in law. This does not permit a "denial" to be demurred to for such insufficiency. A "denial" cannot be demurred to at all. The only remedy is by motion for judgment on it as frivolous (Code C. P., § 537; Wayland v. Tysen, 45 N. Y. 281). This all helps to show the difference between a "denial" and a "defence", and to point out the distinct teminology used in our system of pleading.

It seems to me, therefore, that I should not deem it decided that a "denial" is a "defence"; and I therefore decide that this demurrer to "the defence set up in the answer" does not aim at the "denial" in the answer, but only at the subsequent additional matter set up by way of a defence.

And the difficulty does not end here, for the opinion in the case

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against *Hinchcliffe* already cited seems to say that a demurrer to a pleaded "defence" cannot be sustained if such defence contain allegations inconsistent with the allegations of the complaint, because they must be taken as amounting to a denial. Of allegations of facts which were pleaded as a separate "defence", but which were not new matter constituting a defence at all, but provable under the general denial, the opinion says: "It may be conceded that this defence is not new matter, as it is not in *avoidance or confession* (sic) of the matter set forth in the complaint. But it is none the less a defence, because it is what is termed in pleading a denial." But it does not seem that I am to consider that the court decided this, for it is a long established rule of pleading, again recently declared (i. e., in the same official volume which reports the *Hinchcliffe* case), that affirmative allegations in an answer which are inconsistent with the allegations of the complaint, are not a denial and cannot be taken in lieu of the formal denial required by the Code (Smith v. Coe, 170 N. Y. 162). Says the court: "But as already stated, there was no denial, general or specific, of the allegations of the complaint referred to, except so far as such denial could be spelled out or inferred from an inconsistent version of the transaction given by the pleader in the answer. The allegations of the complaint are controverted or put in issue only by a general or specific denial. A material fact alleged is not controverted or put in issue by a statement inconsistent with the facts alleged, or from which a general denial may be implied or inferred." Therefore, however inconsistent with the allegations of the complaint the allegations in this defence in the present case may be, I am not permitted to treat them as having the effect of a denial, and to overrule the demurrer on the ground that they are or amount to a denial. And the phrase "avoidance or confession" is brand new. We all know what the phrase "confession and avoidance" means (for it is ancient that that is what matter pleaded as a defence must always be), but what does this new phrase mean?

I am still confronted by another difficulty, for a denial may in effect or substance be said or thought to lurk in the allegations here pleaded for a defence; and in the opinion in the very recent case of *Hopkins* v. *Meyer* (76 App. Div. 365), after quoting the provision for denials in section 500 of the Code of Civil Procedure, it is said: "It is nowhere provided where such denials

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shall be made — whether in separate paragraphs, or in connection with other matters." I own to a doubt that the court decided this; it seems to me rather one of those inadvertences which the most learned judges cannot always be free from. The said section 500 separates the provisions for denials and new matter to be pleaded as a defence in numbered paragraphs. I do not see how it could more distinctly mark such separation. In addition to this, section 507 specially provides that defences and counterclaims "must be separately stated and numbered"; i. e., they cannot be mingled with denials, or denials mingled with them. In addition to this it has been frequently held that a "denial" mingled in with matter pleaded as a "defence" will be struck out on motion as being irrelevant there, under section 545 of the Code of Civil Procedure. These decisions are too well known among us to need to be cited.

Coming therefore to the consideration on principle of whether the matter here pleaded for a "defence" is "insufficient in law on the face thereof" (§ 495), (i. e., whether it is new matter which constitutes a "defence" to the action if the allegations of the complaint be all taken as true, on the well settled principle of confession and avoidance), I think I must decide that it is insufficient; that it constitutes no "defence" at all. The allegation of new matter is that the payment was not made under duress, but was voluntary. There is no allegation of duress in the complaint, but on the contrary that the money was paid under a mutual mistake of fact. This new matter in defence is frivolous verbiage. The general denial raises the only issue which is raised by the answer.

There still remains a difficulty, viz., whether the demurrer should be overruled, and the plaintiff remitted to a motion for judgment on the defence as frivolous under section 537 of the Code of Civil Procedure, or to strike it out as irrelevant or redundant under section 545; for the learned judge who writes in the *Hinchcliffe* case says: "There are defences which may be stricken out on motion but cannot be reached by demurrer." It has not heretofore been understood in our learned profession that an entire pleading or plea or defence could be struck (or "stricken") out on motion as irrelevant under section 545, and there is no provision for it, but only that irrelevant things mingled therein may be so struck out. And in respect of frivolous an-

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swers, denials or defences, it is known to us all that a motion for judgment thereon is quite often denied when the case is not perfectly plain, and the moving party remitted to the more deliberate procedure of demurrer. But the converse, i. e., to overrule a demurrer and remit the party to a motion, is a thing unknown; no such practice exists or is permitted.

The demurrer to the matter pleaded as a defence is sustained.

ROBERT SANFORD, Plaintiff, v. BENJAMIN T. RHOADS, JR., et al., Defendants.

(Supreme Court, Kings Special Term, January, 1903.)

Pleading — Admissions and denials are irrelevant in a defence.

Admissions are not necessary in an answer, and neither they nor denials are relevant to, or can be allowed in a defence.

MOTION to strike out portions of the answer as irrelevant and redundant.

Edward S. Clinch for plaintiff.

Samuel B. Thomas for defendants.

GAYNOR, J.: The first paragraph or subdivision of the answer consists of admissions, as though admissions were a necessary part of or ought to be in an answer; and the second paragraph, of denials.

Then come five defences, each being introduced by an allegation that the defendants "Re-allege all the allegations contained in the first and second paragraphs of this answer, to be of and to have the same force and effect as though the same were herein again set forth in full and at large."

The motion to strike this matter out of each defence as irrelevant and redundant under section 545 of the Code of Civil Procedure must be granted. It is useless to again point out the reason why denials cannot be part of a "defence". A "defence" can only consist of matter which cannot be proved under a denial, and which, taking every allegation of the complaint to be true,

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nevertheless defeats the action. Any other matter in it is irrelevant there. A "defence" is "confession and avoidance", i. e., it is on the basis that confessing the complaint to be true, the matter pleaded as a defence nevertheless avoids or defeats it. The phrase has recently been turned about and put in disjunctive form, being changed to read "avoidance or confession" (170 N. Y. p. 481), but I suppose nevertheless that it has lost neither its form nor its life in our educated profession.

Motion granted, with $10 costs.

MARY PEASE, Appellant, *v.* SARAH FREIWALD, Impleaded, Etc., Respondent.

(Supreme Court, Appellate Term, January, 1903.)

False imprisonment — Complaint — Action for a "wrongful arrest".

General allegations that the defendant wrongfully and unlawfully caused the plaintiff to be imprisoned and detained for two days upon a false charge of grand larceny, to her damage, do not, where it appears that the public authorities arrested and imprisoned her after a charge made, state a cause of action, as the arrest and imprisonment must be presumed to have been legal and there is no statement of facts tending to show that they were caused by illegal means.

Assuming that there is such an action as one for a "wrongful arrest", as distinguished from false imprisonment, a complaint therefor is demurrable where it fails to allege detention and damage.

APPEAL by the plaintiff from a judgment of the City Court of the city of New York dismissing the plaintiff's amended complaint and also from an interlocutory judgment entered upon the decision of the General Term of the City Court of the city of New York sustaining the demurrer of the defendant to the two causes of action set forth in the amended complaint.

David M. Neuberger and Eugene N. L. Young, for appellant.

Bert Cohen and Wm. J. Barr, for respondent.

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FREEDMAN, P. J. The complaint sets forth two causes of action and the defendant demurred on the ground that neither contains sufficient facts to constitute a cause of action. The first is sought to be upheld as one for a wrongful arrest and nothing else. Its statement is clearly insufficient, for it alleges neither detention nor damage. Even if there were a cause of action known to the law as "wrongful arrest" which is separate and distinct from false imprisonment and in which detention is immaterial, it would not lie unless accompanied by some damage and none is pleaded. The damages pleaded in paragraph 4 of the second cause of action do not refer to the first cause of action.

The second cause of action presents a more serious question. It is for wrongfully and unlawfully causing the plaintiff to be imprisoned and detained for two days upon a false and unfounded charge of grand larceny, by reason of which she sustained damages, etc. The alleged cause of action cannot be upheld as one for malicious prosecution, because of the absence of well-known elements necessary in such a case. It, therefore, remains to be seen whether a cause of action for false imprisonment is sufficiently set forth. The gravamen of such an action is the act of trespass "committed by one man against the person of another by unlawfully arresting and detaining him without legal authority." Snead v. Bonnoil, 166 N. Y. 325.

If the arrest or imprisonment is caused or procured upon a charge made to some public authority, no action for false imprisonment will lie against the person who made the charge upon the mere ground that the charge was false. This was fully discussed in Cousins v. Swords, 14 App. Div. 338. In that case the complaint alleged arrest and imprisonment after malicious and false complaint made charging a misdemeanor and discharge by the magistrate after examination. In the course of the opinion it was said: "It was not trespass on the part of the defendant to make a complaint against the plaintiff, nor was it any trespass against him to cause his arrest, unless that arrest was for some reason illegal. There was no allegation of this kind. All that was said on the subject in the complaint is that the plaintiff was arrested, and that the arrest was caused by the defendant, and that upon the trial there was no sufficient cause to believe him guilty and he was discharged. But every word of this may be true, and yet it may be equally true that this arrest, brought about by the com-

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plaint of the defendant, was made upon a warrant which was duly issued. If it was so made, there was no false imprisonment, and there is no presumption that it was not so made. The plaintiff is bound to allege in his complaint the facts from which it will appear that his arrest was illegal. In this case, not only does he not allege those facts, but he does not even aver as a proposition of law that his arrest was not perfectly legal."

The foregoing quotation is in the main applicable to the case under review, the only distinction being that here it is averred that the defendant wrongfully and unlawfully caused the plaintiff to be imprisoned and detained. But this averment, taken in connection with the other allegations of the complaint from which it appears that the arrest and imprisonment were not by the defendant, but by the public authorities after charge made, is an averment of a mere legal conslusion. The presumption in such a case is that the arrest and imprisonment were procured by lawful means, whether with or without a warrant, the allegation being that the crime charged was a felony. That being so, the complaint is fatally defective for not setting forth facts to show that the imprisonment and detention were caused by illegal means.

In Lange v. Benedict, 73 N. Y. 12, the alleged false imprisonment was charged to have been the personal act of the defendant and yet it was held that the general averment in the complaint, that the defendant wrongfully and willfully and without jurisdiction falsely imprisoned the plaintiff, did not entitle the plaintiff to judgment under the rule that the demurrer admits the allegations in the pleading demurred to, because the complaint did not rest satisfied with that general allegation, but proceeded to set forth special circumstances under which the general allegation had to be treated as no broader or more effectual than the special circumstances, and because such special circumstances showed that after all the plaintiff had no cause of action.

Neither cause of action set forth in the complaint containing sufficient facts to constitute a cause of action, the judgment appealed from should be affirmed, with costs, to the respondent, but with leave to the plaintiff to amend her complaint within six days upon payment of the costs of this appeal, the costs of the appeal to the General Term and of the demurrers.

CLARKE and GREENBAUM, JJ., concur.

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Judgment affirmed, with costs to respondent, with leave to plaintiff to amend her complaint within six days upon payment of costs of this appeal, the costs of appeal to General Term, and of demurrers.

PATRICK J. McDONALD, Appellant, *v.* THE CITY TRUST, SAFE DEPOSIT AND SURETY CO. OF PHILADELPHIA, Respondent.

(Supreme Court, Appellate Term, January, 1903.)

Action for a wrongful levy — Void chattel mortgage, or bill of sale — Mortgagor's independent transfer of possession — Evidence.

One Camman owned some horses and for a loan by the plaintiff executed to him an instrument, not filed as required by L. 1897, ch. 418, § 90, which was either a mortgage on or a bill of sale of the horses. Camman remained in possession of them. The sheriff, whose surety has been substituted herein, thereafter levied upon them and thereupon the plaintiff sued him. The plaintiff offered, but was not allowed, to prove that before the levy Camman had transferred the horses to him in payment of the loan.

Held, that the evidence was admissible.

That, while the plaintiff could not enforce the instrument and it was void as to Camman's judgment creditor, Camman had a right to make before levy an independent transfer of possession which, if *bona fide* and for value, would vest in the transferee a title superior to the rights of the said judgment creditor.

APPEAL by the plaintiff from an order of the General Term of the City Court of the city of New York, affirming a judgment dismissing the complaint and from the final judgment entered thereon.

David M. Neuberger, for appellant.

Dayton & Swift (Joseph Rosenszweig, of counsel), for respondent.

CLARKE, J. The action is against a surety, substituted as defendant in place of a sheriff, to recover possession or the value of certain horses alleged to belong to the plaintiff and taken by the sheriff upon execution against one Camman from whom plaintiff claims to have derived title. The answer admits taking by the

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sheriff, but denies that the acts of the sheriff were unlawful. The plaintiff proved Camman's ownership on August 14, 1894, the subsequent loan by plaintiff of $200 to Camman and his execution and delivery to plaintiff of an alleged mortgage or bill of sale covering the property in question as security for the loan; also the making of a note for $200 by Camman and his delivery of the same to plaintiff, and that the $200 was ever paid. The mortgage or bill of sale was not recorded and Camman retained possession of the horses for some time after the making of the loan and the alleged mortgage. The defendant relies upon chapter 279 of the Laws of 1833, re-enacted in chapter 418 of the Laws of 1897, section 90, which provides: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, * * * which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof, is filed as directed in this article." It is contended that the mortgage, not having been filed as provided by law, is absolutely void as against creditors of Camman, the mortgagor, irrespective of whether said creditors had or had not actual notice; that the expression "in good faith" applies only to subsequent purchasers and mortgagees, and not to creditors. Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. 484; Stevens v. Buffalo & N. Y. C. R. R. Co., 31 id. 590, cited with approval in Karst v. Gane, 136 N. Y. 316, support such contention and the General Term has affirmed a dismissal of the complaint upon this ground. There is, however, another point on which we are of the opinion that the plaintiff is entitled to a new trial. The plaintiff offered to prove a transfer to the plaintiff of the property in question by Camman in payment and extinguishment of his debt to the plaintiff prior to the existence of any lien against Camman in favor of the judgment-creditor upon whose execution the sheriff took possession of the property. The plaintiff was not permitted to prove such transfer and duly excepted. This refusal was prejudicial error. In Bowdish v. Page, 153 N. Y. 104, there was a transfer of property covered by an invalid mortgage, in payment of the debt and a subsequent execution upon a judgment theretofore entered. Judge Gray, delivering the opinion of the court, said: "In that situation plaintiff's right

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to the goods was superior to the bank's; for it rested, not upon the void chattel mortgage, but upon an independent transfer of possession by the mortgagor." In Stephens v. Perrine, 143 N. Y. 476, the court distinguishes between the case before them, where it was held that title to property covered by a void mortgage could not be obtained by the mortgagee by proceedings taken under the mortgage and which assert the validity of the instrument, and the case of a *bona fide* transfer of the property in payment of the debt. Judge Peckham says at page 481: "If, before any lien had been acquired by the creditors, the mortgagors had delivered the property to the mortgagee in payment of her debt, she could have then held it because it would have been in such a case a transfer of property by them in payment of their debt, and although it would have been in fact preferring such debt, yet it would have been a preference which the mortgagors then had the right to make." In Tremaine v. Mortimer, 128 N. Y. 1, at page 8, Judge Earl says: "While the mortgage is void as to creditors, they cannot touch the property until they come with an execution. As between the mortgagor and the creditors, if the latter can claim that the mortgage had no existence, so also can the former make the same claim. They cannot at the same time assert its invalidity and validity. They cannot seize the property as belonging to the mortgagor, and at the same time deny that he has any title to the property. They must constantly stand upon the position that the mortgage is a nullity. As between them and the mortgagor, both parties have the right to act as if the mortgage had never existed, and before the creditors obtain a lien on the property by virtue of their executions, the mortgagor may deal with the same in any honest way. He may sell it and convey an absolute title, subject to any rights the mortgagee has; or he can deliver the property to the mortgagee in payment of the debt secured by the mortgage, or the mortgagee can release the debt, with or without payment, and thus invest him with an absolute title, and the creditors will have no legal ground of complaint." Judge Gray, in Bowdish v. Page, *supra*, after referring to Stephens v. Perrine, says: "That case and Karst v. Gane (136 N. Y. 316), Tremaine v. Mortimer (128 N. Y. 1), and Mandeville v. Avery (124 N. Y. 376) held this doctrine, that while the mortgagee cannot enforce a void chattel mortgage against the creditors of the mortgagor, yet, if the mortgagor treats it as void and, before the creditors obtain a lien, transfers the

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property to the mortgagee in payment of a debt, that the transaction will hold." Wheeler v. Lawson, 103 N. Y. 40; Kitchen v. Lowery, 127 id. 53. The plaintiff was entitled to prove a transfer in payment of the debt prior to the existence of the lien under which the property was taken, whether the instrument purporting to be a mortgage was one or not, and irrespective of any question of notice as to the existence of such mortgage. If the title of the plaintiff was superior to the claim of the judgment-creditor, because of a prior *bona fide* transfer of the property for value, the plaintiff was clearly entitled to establish that fact.

The proof offered is consistent with his complaint, namely, that at the time of the sheriff's alleged wrongful taking, plaintiff was the owner and entitled to possession of the property in question. He should have been permitted to prove his source of title independent of the mortgage.

Judgment reversed, with costs to appellant to abide the event, and a new trial ordered.

FREEDMAN, P. J., and GREENBAUM, J., concur.

Judgment reversed, with costs to appellant to abide event, and new trial ordered.

WILLIAM SCOTT, Plaintiff, *v.* HENRIETTA L. DOUGLAS et al., Defendants.

(Supreme Court, New York Special Term, January, 1903.)

Partition — Equitable conversion — Practical construction of a decree — Reconversion.

A mandatory direction to executors to sell real estate effects an equitable conversion of it into personalty and the power of sale passes to administrators with the will annexed, but a mere discretionary power does not.

The practical construction put upon a decree, construing a will, by the parties to the decree should be followed when not unreasonable.

In order to effect a reconversion there must be unanimity of intention among all the parties in interest and it must be shown in a manner satisfactory to the court.

ACTION for partition.

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John W. Ingram, for plaintiff.

Frederick W. Sherman, for defendants.

BISCHOFF, J. The question presented is whether, as to parcels Nos. 2 and 3, the parties hold as tenants in common of real estate as distinguished from a common ownership of personalty. The title is derived through William Scott, deceased, and it is the contention of certain of the defendants that, under the provisions of his will, there resulted an equitable conversion of this real estate; the plaintiff, on the other hand, taking the position that there was no equitable conversion and that, assuming the contrary, a reconversion had taken place by agreement of the parties.

In its practical aspect, the question whether there was or was not an equitable conversion depends upon the presence or absence of a mandatory direction to the executors to sell these parcels, since, with the discharge of the last surviving executor, a mere discretionary power to sell would not pass to the administrators with the will annexed, and an equitable conversion cannot be adjudged upon the strength of a discretionary power of sale, the exercise of which is not essential to the scheme of the will. Matter of Tatum, 61 App. Div. 513.

As to these two parcels, however, there was an absolute direction to sell, and the argument for the plaintiff that this direction ceased to affect parcel No. 2 is not found to be forceful.

This parcel consisted of premises which were made the subject of a special devise, involving a sale by the executors and final distribution after the death of certain children of the testator, to one of whom the executors were directed to make a lease at a fixed rental. In an action brought for the construction of the will it was in effect determined that so much of this devise as postponed the sale to the death of children other than the one child to whom the lease was made was void as in contravention of the statute against perpetuities, but the validity of the provision for the lease, and, to this extent, for the postponement of the sale and distribution, was upheld, so far as the decree expresses anything to the contrary, and this has been the practical construction adopted by the parties in the management of the estate.

The plaintiff contends that the decree held the provision for the lease itself void, and claims, accordingly, that there remained nothing for the operation of the special devise, and that this parcel

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was to be treated as part of the general estate, subject only to the general discretionary power of sale contained in the will. No reason is suggested why the court should have declared this first postponement of alienation void, and the decree distinctly referred to the numbered clause in the will which was deemed to be invalid, a clause which affected only the attempted excessive postponement. True, the words of the decree would seem to describe this clause inaccurately, but I must take the specific reference to the clause itself as controlling and as pointing to the more probable meaning of the court, and I fail to find sufficient probability that the intention was to affect a clause of the will other than that referred to. The parties have so understood the decree, as their continued attitude shows, and their understanding appears to have been the more reasonable one.

I must hold, therefore, that the mandatory direction for a sale, as contained in this devise, remained operative, and I do not find that the direction was qualified by the words "in the same and like manner as my other real estate is directed to be disposed of and applied." This reference followed a direction to distribute and must be taken to relate to the disposal and application of the proceeds of a sale, not to the exercise of discretion in the making of the sale, which discretion could be exercised under the general provisions of the will.

I am not inclined to hold that there was an agreement between the parties which resulted in a reconversion of these parcels. For the purposes of such a result there must be unanimity of intention (McDonald v. O'Hara, 144 N. Y. 567–569) and this is wanting. Entries made by the executor in his books, as to the manner in which he received and paid out moneys, afford no actual proof that there had been an agreement to alter the status of this property, nor do the acts and statements of one of the parties bind the others as to the fact of the intention or understanding of all. So far as there was any agreement between the parties, it excluded this property, and several of the parties, including infants, have not been shown satisfactorily to have assented to the alleged reconversion as to these particular parcels.

I conclude that the power of sale, as to parcels Nos. 2 and 3, survived to the administrators with the will annexed.

Form of decision and judgment may be presented accordingly.

Judgment accordingly.

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Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate No. 19462, Issued to CORNELIUS J. FLYNN.

(Supreme Court, Orange Special Term, January, 1903.)

Liquor Tax Law — Discontinuance of a proceeding to revoke a certificate.

The Supreme Court may for sufficient cause order a discontinuance of a proceeding taken to revoke a liquor tax certificate where the application is made by the party who instituted the proceeding, but it cannot order a discontinuance on the application of the holder of the certificate, the commissioner of excise opposing.

MOTION by a certificate holder to authorize the State Commissioner of Excise to discontinue revocation proceedings.

C. L. Waring, for motion.

William Vanamee and William E. Schenck, for State Commissioner of Excise, opposed.

DICKEY, J. Motion is made by an assignee of a license for an order authorizing the State Commissioner of Excise to discontinue these proceedings to revoke and cancel liquor tax certificate issued to Cornelius J. Flynn. The State Commissioner of Excise not only does not join in this application but opposes it, and at the same time moves on the report of the referee and the testimony taken in the case to cancel such license because of proven violation of the law.

The attorney for the holder of the license contends that by chapter 640 of the Laws of 1901 it is in the power of the court in its discretion to order the discontinuance of the proceedings on terms and conditions to be prescribed in the order, on the application of the party proceeded against.

The attorney for the commissioner insists that there is no such power in the court unless his consent to a compromise and discontinuance is first given. In my opinion, proceedings for discon-

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tinuance may be begun by the party instituting the proceedings whether begun by a private person or the State Commissioner of Excise, but the law does not contemplate a motion for a discontinuance being made by the accused person.

If the application to discontinue is made by a private prosecutor then, while eight days' notice of the application to the State Commissioner is necessary, the court may grant leave to discontinue without the consent of the State Commissioner and against his objection.

If the motion is made by the party instituting the proceeding, then, and only then, has the court the power to grant a discontinuance on proper cause shown. Otherwise the court must decide the matter on the testimony. As there is shown a clear violation of the law the license must be revoked, with costs.

License revoked, with costs.

L. TOWNSEND BURDEN, Plaintiff, *v.* THE BURDEN IRON CO., JAMES A. BURDEN et al., Defendants.

(Supreme Court, Rensselaer Trial Term, January, 1903.)

Corporation — Contract between it and its president for the use of his inventions — A partner has no right to another partner's inventions.

A contract, made under a resolution passed in good faith by a vote of the majority of the trustees of a manufacturing corporation, the president not voting, by the terms of which he, serving it without salary, licenses it, for five years and for a royalty found to be fair, to make and use machines containing new inventions made and patented by him and which have proved valuable to the business, is valid and is not subject to attack by a stockholder as fraudulent and void as to him and the corporation.

The corporation has inherently no actual or implied license to use without compensation to him the inventions of its president, and the rule is not changed by the fact that the experimental work on them was done in the plant of the corporation by its employees, where the president paid for it out of his own funds.

A partner has no right or interest in inventions made by another partner although the use of them might facilitate the business of the firm.

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ACTION in fraud.

Countryman & DuBois (Robert W. Hardie and Frank S. Black, of counsel), for plaintiff.

William J. & E. G. Roche (Charles Neave, Frederick P. Fish, and Austen G. Fox, of counsel), for defendants.

BETTS, J. The testimony in this action was taken before Mr. Justice Chase, while he was a trial justice, but prior to his decision thereof he was appointed a member of the Appellate Division. Upon stipulation by the attorneys the case was submitted to me upon the record as made up by Justice Chase.

The time necessarily consumed in the examination of the very voluminous record and the authorities cited by the respective attorneys has been such, in order to intelligently pass upon the proposed findings submitted, that I shall give only a very brief opinion embodying some of the reasons for the action taken.

In a prior action between substantially the same parties the character of the corporation, the history of its formation, its business, and much information concerning the principal parties to this action were fully set forth. Reference is, therefore, made to those decisions of the courts in that action found in 8 App. Div. 160, and 159 N. Y. 287.

This action was commenced some time before the decision of the Court of Appeals was handed down in that case.

In January, 1898, at a meeting of the board of trustees of the defendant The Burden Iron Company, a resolution was passed by which it was decided to enter into a contract or agreement with the defendant, James A. Burden, for a term of five years for the license by the said company to make and use machines containing inventions described in certain letters-patent, claimed to be owned by said defendant, James A. Burden, and referred to throughout this action as the patents of 1887, 1894 and 1895. For this license the company was to pay said James A. Burden the sum of eight cents for each keg of 100 pounds of horseshoes manufactured by the use of the inventions secured by said letters-patent. This agreement was subsequently executed. It is so short and reference thereto will be so frequent in this opinion that it is here inserted in full. It is as follows:

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"This agreement made the 5th day of January, 1898, between James A. Burden, of the city of Troy, county of Rensselaer and State of New York, of the first part, and the Burden Iron Company, of the same place, hereinafter called 'The Company,' of the second part.

"Whereas, The said James A. Burden has procured and is now the owner of the following letters-patent of the United States, to wit:

"Letters-patent dated November 15, 1887, No. 373125.

"Letters-patent dated August 14, 1894, No. 524307.

"Letters-patent dated January 1, 1895, No. 531903.

"Said letters-patent being all for new and useful improvements in horseshoe machines.

"And whereas, the said company is desirous of obtaining a license to make and use machines containing the several inventions described and claimed in the said letters-patent for the term of years hereinafter stated,

"Now, this agreement witnesseth:

"That in consideration of the covenants of said company hereinafter contained, the said James A. Burden has licensed and does hereby license the said company to make and use horseshoe machines containing the inventions described and claimed in the said several letters-patent at their works in the city of Troy, New York, for the full term of five years from the date of this instrument. And the said James A. Burden covenants and agrees that during the existence of this contract and the faithful performance thereof, on its part, by the said company, he will not assign the said patents or either of them, nor grant licenses thereunder to any party other than the said company.

"And the said James A. Burden further covenants and agrees that in case of infringement by other parties upon said letters-patent, or either of them, during the existence of this contract, he will, at the request of the company, take the proper legal steps to put an end to said infringements in his own name and at his own expense.

"And in consideration of the above license and covenants the said company hereby agrees to pay to the said James A. Burden as a royalty for the privilege of making and using the said patented inventions the sum of eight cents for each keg of one hundred pounds of horseshoes manufactured by the use of the inven-

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tions secured by all or either of the said letters-patent, after the execution and during the existence of this agreement.

"And the company further covenants and agrees that upon each first day of April, July, October and January, during the existence of this agreement, it will render to the said James A. Burden a just and full account of all the horseshoes manufactured by the use of said patented inventions by the company during the preceding three months and that within fifteen days after the rendering of such account it will pay to him the royalties upon the same as provided by this contract.

"In Witness Whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

"JAMES A. BURDEN.

"THE BURDEN IRON COMPANY,

"By NICHOLAS J. GABLE,

"*Secretary.*"

James A. Burden was at that time, is now, and has been since the incorporation of The Burden Iron Company, in 1881, the president thereof. He did not attend this meeting.

The meeting was attended by the four other trustees, I. Townsend Burden, the plaintiff, and the defendants John L. Arts, Nicholas J. Gable and James A. Burden, Jr. The plaintiff voted against this resolution, the other three trustees for it. At that time the plaintiff owned 998 shares of the stock of the corporation, the defendants James A. Burden owned 998 shares, John L. Arts 2 shares, and Nicholas J. Gable and James A. Burden, Jr., each 1 share.

The plaintiff as a stockholder brings this action to have that agreement of January 5, 1898, adjudged to be fraudulent, illegal, null and void and of no effect, and that the same be delivered up to be cancelled. That said three letters-patent be adjudged to be null and void and of no force and effect as against the plaintiff and the defendant The Burden Iron Company, and that the defendant The Burden Iron Company be adjudged to be the real and lawful owner of the letters-patent and the inventions secured thereby, and that the same be assigned to the defendant The Burden Iron Company, and that said James A. Burden be adjudged not to be the discoverer of the said inventions or devices, and that the resolution of the board of trustees of January 5,

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1898, be adjudged to be fraudulent, illegal, null and void and of no effect, and that the defendants be enjoined from paying to the defendant James A. Burden any royalties under said resolution or agreement or for or on account of said letters-patent or the improvements or devices secured thereby.

This action is based on fraud. The plaintiff claims that this resolution authorizing this contract and the contract made thereunder was fraudulent as to him and as to The Burden Iron Company for the reasons, among others, that the defendant James A. Burden was not the inventor of the devices or methods described in these letters-patent and that each of the different trustees present at this meeting which passed this resolution authorizing the execution of this agreement knew of this fact as well as did James A. Burden himself. Also that the patents were invalid for the reason that James A. Burden was not the inventor, that there was no patentable novelty secured by either one of them, that the real inventor or inventors were employees of the defendant company or its preceding firm, that the devices or inventions secured thereby had been in public use more than two years prior to the application for these several letters-patent. He also claims that, in any event, there was a license on the part of The Burden Iron Company to use the machines, devices or methods secured by these patents; so, even if valid, this defendant, James A. Burden, was not entitled to any royalty thereunder, and that these facts were well known to these trustees who directed this contract to be entered into and subsequently entered into the same on behalf of the defendant The Burden Iron Company.

It is stoutly contended by the defendants that this issue of fraud is the only issue in this case, that having asserted this fraud the plaintiff must maintain the same unless he does so by showing by a preponderance of evidence that these trustees who took this action on the part of the company were aware of such fraud and participated in it. This court is not called upon to decide whether these patents are valid or otherwise, or whether James A. Burden is the inventor or not, and the numerous other questions growing out of these two principal ones.

It is also claimed, on behalf of the defendants, that the validity of these three patents cannot thus be attacked in a collateral action. The defendants cite the case of Marston v. Swett, 66 N. Y. 206 and 82 id. 526, in support of this claim. The rule in

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that case is held to be substantially as follows: That where the parties were the assignees of a patent supposed by all of them to be valid and in force and some of the assignees thereof agreed with the remaining assignees that the second parties should have the exclusive use and benefit thereof, and such exclusive use is had, and the first parties refrain from any use, the parties "receiving the benefit of its supposed validity are liable for royalties agreed to be paid and cannot set up as a defense the actual invalidity of the patent. The reasons for the rule are that the party has got what he bargained for; that he cannot be allowed at the same time to affirm and disaffirm the patent; and that he cannot in this way force the patentee into a defense of his right and compel him to try it in a collateral action." Numerous English cases are there cited as being in harmony with this view, and it is stated that these cases "steadily resisted all attempts of licensees under patents apparently valid to raise the question of their validity."

While I concede that there is much force in these contentions of the defendants, still there is a distinction between Marston v. Swett, *supra,* and this case in the fact that it would be impossible for this patent to be void, for the reason that James A. Burden was not the inventor thereof under the circumstances claimed by the plaintiff, without said James A. Burden having full knowledge thereof, so that if this one, at least, of the plaintiff's contentions were true there would be a trustee of the defendant company individually entering into a contract with it and receiving royalties therefrom and giving nothing in exchange therefor; in other words, a contract without consideration. So I have concluded on account of the involved relation of the parties to this action and to this contract that the ends of justice would be best subserved by fully deciding the issues presented by the pleadings and the record here.

One of the pivotal questions is whether James A. Burden was the inventor or not, whether he or some one or more of the employees of himself or The Burden Iron Company invented these devices or methods covered by the three patents in dispute.

There is quite a seeming contradiction in the testimony as shown by this record. This court has not had the advantage of seeing any of these witnesses so that much careful study has been required to ascertain where the truth lies. It is not my purpose to go in detail into the evidence submitted, suffice it to say that

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I consider it clearly shown from the entire evidence that James A. Burden was the inventor of these three disputed patents. The work undisputably done by the others in connection with the machines or devices erected from the specifications of such letters-patent, the suggestions, the framing and construction of mechanical parts of said devices during the experimental stages were such work and such work only as would be expected to be and is done by mechanics skilled in the arts in carrying out the instructions of the inventor in whatever manner such instructions are conveyed. His mind conceived the idea. He saw the completed machine or method and the skilled mechanic was called in to frame and construct in wood or metal the model or machine. All this was accompanied by the usual number of practical errors, failures and mistakes that are attendant upon the construction of such complicated machinery and the adaptation of ideas to actual operation. Some of the men who assisted were very skillful and testified that their ideas rather than James A. Burden's conceived the inventions. But numerous contradictions, changes of testimony and a vivid memory at one time and an unreliable one at other times together with the evidence produced by the defendants lead me to the conclusion that the patentee was the inventor. Blandy v. Griffith, 3 Fed. Cas. 576–678; Agawam Co. v. Jordan, 7 Wall. 583.

The presumption arising from the oath of the applicant that he believes himself to be the first inventor or discoverer of the thing for which he seeks letters-patent remains until the contrary is proved. Elizabeth v. Pavement Co., 97 U. S. 126.

It has been contended that even if James A. Burden was the inventor of the patents they ought of right to belong to the corporation since he was president of the company or a copartner with plaintiff at the time of the inventions. But he was serving as president without salary and was under no obligation to perform any such services for the company, or to give to it the results of his inventive genius. We shall show later that the fact that he was a copartner with plaintiff at the time of the invention gave the firm or the succeeding corporation no title to or interest in the invention of James A. Burden. Hence we have the inventor of these three devices or methods applying for and obtaining a patent upon his own inventions and being the owner of such patents.

Henry Burden, the father of James A. and I. Townsend

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Burden died in 1871. At the time of his death the horseshoe machines then in use and called in this case the Henry Burden machine did not turn out a horseshoe that was considered by his sons to be up to the requirements of the trade nor was it considered to be such a shoe as was necessary to enable them to stand the strong competition then beginning to be felt of other horseshoe manufacturers so that a machine was built called the "swaging machine." The horseshoes after passing through the Henry Burden machine were passed through this swaging machine and certain roughness and irregularities were taken from them. This enabled the company to keep its business for some years, but the stress of competition again becoming greater the improvements secured by these three patents in question were made upon the swaging machine so that this one machine did the work formerly done by the Henry Burden machine and the swaging machine. Experiments with this "new machine" so called in the testimony, or "the new process," as some times referred to, were continuous until about the year 1897, that is to say, some parts of it were found to be satisfactory before that time but improvements and mechanical changes were made during portions of that period and also the necessary additions or changes were made so it was about the year 1897 before it was completed and the large number of varieties of horseshoes in 1898, manufactured by the company, were enabled to be turned out by it.

Some time before this James A. Burden had told certain of the trustees of The Burden Iron Company that he should expect a royalty from the machines perfected from his patents when completed, so we find him in the fall of 1897 demanding from the defendant Arts, the general manager and superintendent of the defendant The Burden Iron Company, such royalty. For the very comprehensive powers exercised by Arts in this company, reference may be had to the decisions hereinbefore quoted in the prior action between these parties. The amount of royalties desired was not stated by Mr. Burden, but Arts apparently acting in behalf of the company, set about ascertaining this amount and the propriety of the payment of any royalty in an apparently fair way. He consulted the late Esek Cowen who had been the attorney for the company for many years and who had also at different times been the attorney for both the plaintiff and the defendant James A. Burden, concerning the matter. Cowen went

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to Washington and made investigations concerning the patents. Arts investigated the books of the company to ascertain what saving, if any, had been made by the company under the use of what he calls the new process which was the manufacture of the horseshoes by this company with the new horseshoe machine instead of with the old or Henry Burden machine and the swaging machine and, after eliminating whatever he and his assistant considered might be doubtful savings, or savings which were so involved that it was not clear what proportion thereof might be ascribed to the new process, he concluded that about eleven cents per keg was the saving to the company by this new process, but he decided, for greater safety and protection, that eight cents per keg should be the maximum amount of royalty paid. The other trustees aside from James A. Burden and I. Townsend Burden agreed with him. Mr. Cowen returned from Washington and reported the patents all right and he also advised that it was right for this agreement to be entered into. James A. Burden objected to the amount of the royalty, claiming it was too small but eventually agreed and the contract was entered into.

The three defendant trustees testified in substance that they passed the resolution and entered into the contract in question for the company in good faith; that they made or had made an investigation which satisfied them that it was fair and right for James A. Burden to have this royalty and that the amount was not excessive but fair and just.

The method adopted by the trustees to ascertain what was a fair amount of royalty, they having determined in the first instance that a royalty should be paid, seems to have been a practical and fair one. Testimony has been taken and tables introduced in evidence showing in detail the methods used and the results arrived at. No successful criticism has been made by the plaintiff upon the method used nor has he shown any better method of arriving at the amount of savings or at what would be a fair royalty, if any royalty should be paid, although he objects on the ground that the royalty is excessive. Certainly a great saving has been shown in the expense of manufacturing horseshoes by this company since the adoption of these new machines or this new process. The defendants claim that this saving of expense came from the adoption of the new process or the new machines secured to the company by the use of these three patents. The

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plaintiff denies this, yet he does not dispute that a saving has been effected and he does not show that it was reached by any other means, so I must and do conclude that the saving was accomplished by this new process or by the use of these new machines secured by these patents and that the royalty agreed to be paid was fair and not excessive. In any event, this matter was something within the province of the board of trustees to ascertain and act upon. They were acting within their powers. They have not been shown to have exceeded their powers nor have they been shown in regard to this royalty to have acted unjustly, fraudulently or dishonestly either toward this plaintiff or the defendant The Burden Iron Company, but the expenses have been shown to be greatly reduced and the income to have been increased. They ascribe this to the adoption of this new process and the court agrees with them.

As to the objection that these patents, or one or more of them, were invalid because there was no patentable novelty secured by them, the facts seem to be substantially as follows: These new machines are built upon what was formerly the swaging machine. They are now used to manufacture what is called in this case the "standard shoe" and also a shoe called the snow, mud or easy shoe. The principal business of the company is in manufacturing the standard shoe. In making these two different kinds of shoes, different parts of the inventions secured by these patents are used. Some of these parts had been in use before but it is claimed by the defendants that the combinations or the methods in each case were new and much evidence has been given to sustain this contention and it apparently does so. In addition to the evidence presented here, we have the action of the Patent Office declaring that this was a patentable novelty. The action of the Patent Office alone presents a *prima facie* case of the patentable novelty of these inventions or processes that must be met and overcome by the plaintiff before the defendants would be called upon in this collateral action to furnish any proof, and I do not think that the plaintiff has satisfied this burden thus upon him, even to disturb the *prima facie* case made by the patent of these inventions.

As to the claim that the devices or inventions secured by these letters-patent had been in public use or on sale for more than two years prior to the application for these several letters-patent, there has been no such sale shown as is contemplated by the statute and decisions thereunder.

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Neither has it been shown that the completed devices or methods as used at the time these various patents were applied for were in public use two years prior thereto respectively. The only use shown was the use by The Burden Iron Company. This was experimental, changes were being constantly made. The machines were also being adapted to the manufacture of the large number of varieties of standard shoes finally made by the company amounting, at the time of trial, to over one hundred varieties. Manifestly the necessary details of construction to make such machinery as would turn out all this variety of shoes would take a long time. As fast as the machinery was completed the new varieties were constructed and the testimony is that it was about 1897 when all of these were made. Elizabeth v. Pavement Co., 97 U. S. 134.

I do not think there is any actual or implied license of the corporation to use these devices or methods covered by the three patents in question. This license more frequently arises where the patentee is an employee, is a personal one and extends only to the machine or devices actually in use. It has been shown, I think, that James A. Burden was not in any sense an employee of the corporation nor was he an employee of the firm.

The principal contention of the plaintiff in this regard is that these machines, during experimental stages and afterward, were constructed, altered and changed by the employees of the corporation or partnership of James A. Burden and I. Townsend Burden which preceded it. But all of this work, or at least substantially all of it, was charged to James A. Burden and paid by him. Of course this does not include the machines in use at the time of the contract, as the company was to make them in any event and did so.

It was held in Burr v. De La Vergne, 102 N. Y. 415–419, that "The proposition * * * that one partner acquires no right or interest, legal or equitable, in an invention made by his copartner during the existence of the partnership by reason merely of the copartnership relation, although the invention relates to an improvement in machinery to facilitate the business carried on by the firm, and although the partner making the invention, uses copartnership means in his experiments, and is also bound by the copartnership articles to devote his whole time and attention to the firm business, is a doctrine supported by authority and consonant with reason." That disposes of the license so far as the work done during the

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partnership was concerned. James A. Burden never acquiesced in the proposition that the corporation should use his invention without the payment of any royalty. On the contrary he informed Arts, the general manager and superintendent, that he should require payment of royalties and seems to have demanded such payment as soon as a basis for the adjustment of a fair royalty could be had. The company by its superintendent and some of its trustees was so informed. A stockholder would, in any event, require no such notice; but the evidence of the plaintiff does not disclose that he was led to suppose by any one that James A. Burden would permit the use of his inventions without compensation, so that all the material elements of a license seem to be lacking. In any event such license would be only for the machines in use nearly or quite all of which some time since were worn out and replaced, would not be exclusive and would have conveyed to this company no such valuable rights as were conveyed by the contract sought to be vacated.

This is an equitable action. So far as the equities are concerned this plaintiff certainly ought not to be heard to complain that this agreement or contract was not entered into earlier. He was not injured but benefited. The company was getting the use of these devices for nothing and it would have benefited the plaintiff, as a stockholder, if the experimental stage or structural stage of these machines to construct the different kind of shoes had been longer continued.

It has been shown, I think, that valuable rights belonging to James A. Burden were conveyed to the defendant, The Burden Iron Company. No one has directly attacked these patents. No one has appeared claiming to own them. No infringements have been shown. The company got all it bargained for and, judging from results, it got a good bargain. I do not think this contract should be vacated or set aside or any of the other relief asked for granted.

A judgment may be entered accordingly.

Judgment accordingly.

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THE CITIZENS' STATE BANK, Plaintiff, *v.* SARAH B. COWLES, Defendant.

(Supreme Court, Westchester Trial Term, January, 1903.)

Check — Holder in due course — Delay in negotiating — Usage.

A domestic check, payable to the order of the payees, first transferred by them to a person who took it in good faith for value and without notice of dishonor, may be enforced against the maker by a bank which took it from him in due course, and defences (other than certain defences of fraud) which the maker had against the payees are cut off.

Where the payees, who lived in Kansas, received the check, dated June 1, on that or the next day and in the State of New York, and the maker stopped its payment on June 4 because of an alleged breach of warranty of the chattels for which the check was given, and so notified the payees, and they then sent the check from New York city to be cashed to Kansas to one Hoffman, a resident there, a neighbor and the president, of the plaintiff bank, who had for years cashed their paper, and he received it and deposited it with the plaintiff on June 8, the court considered that none of these facts and delays constituted such an express or implied notice of dishonor to Hoffman or to the plaintiff as to let in against it defences which the maker had against the payees.

A question put to a local bank president "Is there any custom or usage as to the length of time within which a check can be negotiated or will be accepted in negotiation, reasonable length of time after its issue?" is improper — where the check was first accepted in Kansas by the plaintiff — as apparently calling for a local instead of a general custom, and is also objectionable because it attempts to fix, by the witness, a "reasonable length of time" when that was for the court to find from the facts, including any established general usage.

MOTION for a new trial on the minutes, a verdict having been directed for the plaintiff on its motion. The defendant did not move for a direction of a verdict.

Action by the holder of a bank check against the drawer. The check was given on June 1st, 1900, to the order of the payees, a

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copartnership. It was endorsed and transferred by the payees to another, and by him endorsed and transferred to the plaintiff on June 8th, 1900. The plaintiff presented it for payment to the bank upon which it was drawn on June 14th, 1900, and payment was refused, having been stopped on June 4th by the drawer, the defendant.

The plaintiff having put the check and notice of demand and protest in evidence, rested.

The facts then established by the defendant, or which the jury could have found on the evidence put in by her, were as follows: She purchased of W. W. Miller & Sons a team of horses in the city of New York, and they afterwards delivered them to her at her request at her residence at Rye, Westchester county, N. Y., about 25 miles distant, on June 1st, 1900, at about midnight; at the time of such delivery she gave her check dated June 1st to their order on a bank at Portchester in the same county in payment of the purchase price; the check was delivered about midnight of June 1st, or just after midnight, which would be on June 2nd, and was taken back to New York city that same night, or before banking hours on the morning of June 2nd; the horses were purchased and paid for under a written warranty that they were sound and well broken; the contract of warranty was broken, and thereupon on June 4th the defendant notified the said bank not to pay the check, and also on the same day notified the said payees of such breach, and that she had so stopped payment of the check; the said payees still had possessian of the check, but thereafter endorsed it to the order of one Hoffman and sent it by mail with other similar checks to him at Little River, Rice county, State of Kansas, to be cashed by him; Hoffman received such check on June 8th; he was a resident of the said Little River, and president of the bank of the plaintiff which was also located there; he paid the said payees for such check the amount thereof the same day he received it, and on the same day endorsed it and deposited it to his individual account as a depositor with the plaintiff and the plaintiff credited him with the amount thereof; the plaintiff on the same day sent it to a bank in Kansas City for credit and collection, and after the usual course it was finally presented to the said bank at Portchester for payment on June 14th, 1900; payment was refused, and the teller wrote the words "payment stopped" across its face; the said payees, consisting

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of three persons composing the said firm, were residents of Lyons, in said Rice county, State of Kansas, distant about fourteen miles from the said Little River, and connected with it by railroad, telegraph and telephone; they carried on the business of horse and cattle raising on a farm at the said Lyons, and two of the firm had brought some of the firm's horses to New York city to sell, and were there on that mission, when the plaintiff purchased the team of them; the firm had had business dealings with said Hoffman for several years, and also did business with the plaintiff bank, but their firm had no account with the bank; they had had the negotiable paper received by them in their business cashed at the said bank for several years, sometimes by it and sometimes by the said Hoffman individually.

Peck & Wilcox for plaintiff.

E. B. & C. P. Cowles for defendant.

GAYNOR, J.: The plaintiff made out a *prima facie* case by putting in evidence the check and the notary's certificate of its presentation for payment, and of demand and refusal, and rested. This sufficed, for the presumption of law is that the transferee of negotiable paper became a holder in due course, and in an action to recover thereon the burden is on the defendant to prove the contrary. The negotiable quality of commercial paper rests chiefly on this rule, and every one may rely upon it implicitly. Such burden never shifts, unless the defendant proves that the negotiable instrument was lost or stolen, or obtained by duress or fraud, or, in this State, diverted from the purpose for which it was issued by a fraudulent breach of trust; in which cases the burden is shifted to the plaintiff to show that he is a holder in due course, i. e., that he took it before it was due without notice of the defences against it and for value; or that some of his predecessor transferees so took it, for of course if a transferee gets good title all transferees after him, whether before or after maturity, get the same title (Case v. Mechanics' Banking Assn., 4 N. Y. 166; Vosburgh v. Diefendorf, 119 N. Y. 357; Wardell v. Howell, 9 Wend. 170; Daniel, § 810 *et seq.*; N. Y. Negotiable Instrs. Law [L. 1897, ch. 612], § 91).

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But none of these defences was pleaded here; nor would the evidence permit a finding to support any of them, if it were necessary to come to that. The check was freely given for property purchased, and the title of the payees to it was perfect. The defence pleaded is a breach of an alleged contract of warranty made by the payees of the check that the team of horses sold and delivered by them to the defendant, the drawer, and to pay the purchase price of which the check was given simultaneously with the delivery of the horses on June 1st at midnight (or shortly after), were sound and well broken; and that upon such breach payment of the check was stopped on June 4th by the defendant by notice given by her to the bank on which it was drawn; of all of which the plaintiff is alleged to have had knowledge before the transfer of the check to it.

From the evidence introduced by the defendant to rebut the plaintiff's *prima facie* case, the making of the said contract of warranty, its breach, the stopping of the payment of the said check thereafter by the defendant by notice to the bank on which it was drawn, the giving of notice of that fact and of such breach to the said payees, and of their endorsement and transfer of the check to Hoffman thereafter, and of Hoffman's endorsement and transfer thereof to the plaintiff on the same day he received it, viz., on June 8th, were all established or could have been found by the jury. The testimony of the one of the payees who sent the check to Hoffman by mail from New York city which was taken by commission, and was read by the defendant with the other evidence taken in the same way, is that he so mailed the check to Hoffman at his place of residence, Little River, State of Kansas, on June 2nd; but as the testimony of Hoffman is that he received it by mail on June 8th, the jury could have found from the distance and the course of the mails that it must have been mailed later than June 4th, i. e., after notice to the said payees of the breach of warranty and that payment of the check had been stopped.

But there was no evidence that Hoffman, the first transferee, or the plaintiff, his transferee, had any notice or knowledge before acquiring the check of its actual dishonor by the stopping of its payment by the defendant, or of the breach of the warranty; or that the plaintiff or Hoffman was not a holder for full value. These things cannot be found as facts on mere suspicion; on the contrary, the rule established for the safety of the commercial

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world is that they must be proved by the defendant (Daniel, § 769 *et seq.; id.* § 10 *et seq.;* Himmelmann v. Hotaling, 40 Cal. 111).

He who draws and puts negotiable paper in circulation does so under a rule which requires him to prove that a holder subsequent to the payee did not become such in due course, in order to make available against him defences which would be good against the payee. This is the prime rule on which the safety of negotiable paper rests. And if it had been proved that Hoffman had such notice or knowledge, the fact that he was president of the plaintiff would not suffice to attribute his knowledge to the plaintiff when it received the note from him (Casco National Bank v. Clark, 139 N. Y. 307; Merchants' National Bank v. Clark, 139 N. Y. 314). And, finally, when the check was deposited with the plaintiff by Hoffman in the individual account which he had with it as a depositor, and credit given to him therefor, the plaintiff became the owner thereof in due course, with all the rights of such a holder (Cragie v. Hadley, 99 N. Y. 131; People v. St. Nicholas Bank, 77 Hun, 159; Riverside Bank v. Woodhaven Junc. Land Co., 34 App. Div. 359).

But the defendant claims that the check was on its face overdue or presumptively dishonored from lapse of time as a matter of law when it reached Hoffman, and that therefore he took it of the payees, and the plaintiff took it of him, subject to any defence to it which then existed against the payees in favor of the drawer. In considering this question we must not be misled by the rule (now expressed by section 322 of our Negotiable Instruments Law) that unless a check be presented for payment to the bank upon which it is drawn within a reasonable time after its issue, and the bank meanwhile suspends payment, the drawer is thereby released if he had funds there to meet the check. What is a reasonable time in such a case is settled by the decisions, viz., where the payee receives the check at the same place where the bank upon which it is drawn is located, it must be presented not later than next day, but if he receive it at another place, it suffices if he send it by mail for collection next day (Smith v. Janes, 20 Wend. 192; Daniel, § 1590, *et seq.*). But such rule has no application to the present case. The rule in some jurisdictions seems to be that a check is never overdue or presumptively dishonored so as to let in against a transferee for value defences which exist between the drawer and payee, other than that the bank has failed

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(Bull v. Bank of Kasson, 123 U. S. 105). But the law in this state is (and is now expressed in the Negotiable Instruments Law, § 92) that the same elastic rule applies to checks as to other negotiable instruments payable on demand, with an apparent extra leniency in favor of checks, viz., that if such instruments be negotiated by the payee an unreasonable length of time after their issue, the transferee is not to be deemed a holder in due course, but is subject to the defences, and in this State to the counter claims (Code Civ. Pro. § 502), existing between the drawer and payee. What is a reasonable length of time for such instruments to run before they are to be thus deemed overdue or dishonored as a matter of law is not fixed. All we have to go by is that regard must be had to the nature of the instrument, and the facts of the particular case (Cowing v. Altman, 71 N. Y. 435; Herrick v. Woolverton, 41 N. Y. 581; Ames v. Meriam, 98 Mass. 294; First Nat. Bank v. Harris, 108 Mass. 514; Himmelmann v. Hotaling, 40 Cal. 111; Daniel, § 1633 *et seq.;* Neg. Instrs. Law, § 4); and where the facts are undisputed (and, I suppose it should be added, different inferences cannot reasonably be drawn from them), the question is one of law (Bryden v. Bryden, 11 Johns. 187; Kelty v. Second Natl. Bank, 52 Barb. 328).

It does not seem that the question whether the check was overdue or presumptively dishonored when it reached Hoffman or the plaintiff was a question of fact, and therefore for the jury. The evidence on which such question rested was all introduced by the defendant, as it had to be. The essential facts are undisputed, and none of them could be rejected; and hence the question was one of law. The learned counsel for the defendant seems to understand that the jury would have been free to reject the evidence to the contrary, and find, on no evidence whatever, that Hoffman and the plaintiff had knowledge of what the check was given for, of the warranty and its breach, and of the stopping of payment of the check by the defendant; but a jury trial is not so loose and irresponsible as that.

I have been referred to no text writer or decision holding that a check is on the fourth or fifth day after its delivery (taking the time when this check was endorsed and mailed to Hoffman), or on the sixth or seventh (taking the time when it reached him), to be deemed as matter of law overdue or presumptively dishonored, so as to let in against a transferee who then takes it defences ex-

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isting between the drawer and payee. A recurrence to the decisions and authorities already cited will show that a much longer time is held to be insufficient for that purpose. Nor is the fact of the payees in this case sending the check home to Kansas sufficient to make this a special case. They had to remit their collections home by checks or drafts, and it was as reasonable to send this one (the drawer of which was undoubtedly good) as to collect it and procure another check or draft for transmission instead. The court must take notice of the fact that exchange is in favor of the city of New York, and that checks and drafts on banks there or in its vicinity are in demand throughout the rest of the country generally and at a premium.

I am cited to section 94 of the Negotiable Instruments Law as defining when the title to a negotiable instrument is to be deemed "defective", i. e., when obtained by duress, fraud, and so on, and to section 98 which shifts the burden of proof in such a case. These two sections are only a codification of the rule of law of this State as it was established by the decisions and which I have hereinbefore referred to.

The title of the payees to this check was perfect. They had the right to negotiate it, and were not obliged to stop on the claim of the defendant that the warranty was broken. But, as already stated, no fraud is pleaded.

It is claimed that the objection to the questions in respect of usage put to two presidents of local banks, one at White Plains and one at Rye, Westchester county, was erroneously sustained. The question to one was, "Is there any custom or usage as to the length of time within which a check can be negotiated or will be accepted by a bank in negotiation, reasonable length of time after its issue?" In the first place this apparently called for some local custom, instead of specifically calling for a general one, one existing in Kansas, where the check here in question was accepted by the plaintiff (Williams v. Brown, 53 App. Div. 486). Next, while it may be that facts showing any established general "usage of trade or business" (Neg. Instrs. Law, § 4), taking into account time, distance, and the nature of the transaction in all respects, might have been proved (although this is none too plain), the witness was not asked for a fixed usage, but for a "reasonable length of time", which was for the court to find from all the

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facts, including any fixed general usage. This disposes of the question to the other witness, which is also not altogether intelligible.

The motion for a new trial is denied.

TAYLOR STRYKER, Plaintiff, *v.* HENRY D. CHURCHILL, Defendant.

(Supreme Court, Greene Special Term, January, 1903.)

Office — Unconstitutionality of Penal Code, § 41x — Order to show cause.

The provisions of the Penal Code, § 41x, forfeiting the office of an elected candidate for his failure within ten days after the election to file a sworn itemized statement of his election expenses, are repugnant to the State Constitution, art. XIII, § 1, since they prescribe an oath different from the one required by it and it declares that "no other oath, declaration or test shall be required as a qualification for any office of public trust".

An order to show cause takes the place of a notice of motion and can be substituted therefor only when and as authorized by Code C. P., § 780, and General Rules of Practice, No. 37.

AT the general election held on the 5th day of November, 1901, the plaintiff and the defendant were each candidates for the office of commissioner of highways of the town of Cairo, county of Greene. By the certified statement of the canvassers of election of the town of Cairo, filed in the office of the town clerk of the town of Cairo, it appears that the defendant had one more vote than the plantiff for such office.

The plaintiff herein expressly alleges that he does not claim the office by virtue of the election held November 5, 1901, "but by virtue of an appointment thereto by the town board of said town to fill a vacancy caused by the resignation of the incumbent thereto before the expiration of his term." Such appointment of the plaintiff was made December 26, 1901.

Upon such appointment being made, the plaintiff entered into the possession of said office, and of the books and papers thereof, and still continues to hold and possess the same.

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The defendant has filed in the office of the town clerk of the town of Cairo, his oath of office, and bond for the faithful performance of the duties of said office, and demanded from the plaintiff all books and papers of said office, which demand the plaintiff has not complied with.

The defendant thereupon commenced proceedings before the county judge of Greene county to compel the plaintiff to deliver and surrender to him the said books and papers, and such proceedings were directed to be heard before the said county judge on the 24th day of December, 1902.

The plaintiff alleges that the defendant did not within ten days after the election, to wit, on November 15, 1901, file in the office of the town clerk, or in any other office, an itemized and verified statement of the moneys he had contributed and expended in aid of his election, as provided for by section 41x of the Penal Code, and that by such neglect he has forfeited his office, and is not entitled to the possession of the books and papers thereof.

Upon the summons and complaint in this action, together with an affidavit of the plaintiff's attorney, setting forth amongst other things, the foregoing facts, the plaintiff on the 23rd day of December, 1902, obtained from a justice of this court an order restraining the defendant from prosecuting such proceedings before the county judge to compel the plaintiff to deliver to the defendant the books and papers belonging or pertaining to the office of commissioner of highways of the said town of Cairo, and from instituting or prosecuting any other proceeding for that purpose, except an action in the nature of *quo warranto*, and also enjoining and restraining the county judge from the further hearing of such proceedings, until the further order of the court; and it was also further ordered that the defendant show cause before this court at a Special Term thereof to be held on the 17th day of January, 1903, why such injunction should not be made permanent during the pendency of this action. And it further provided that the service of a copy of such order should be made on or before December 24, 1902.

The defendant made a motion at a Special Term of this court held on the 10th day of January, 1903, to vacate such order to show cause and to dissolve the injunction.

Section 41x of the Penal Code is numbered in some editions of 1902 as 41w.

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Lewis E. Carr, for plaintiff.

Clarence E. Bloodgood, for defendant.

HERRICK, J. An order to show cause takes the place of a notice of motion, and cannot be substituted therefor, except in the manner particularly pointed out and authorized by section 780 of the Code of Civil Procedure, and by rule 37 of the General Rules of Practice of the Supreme Court.

The affidavit upon which the order to show cause herein was granted sets forth none of the matters required by such section of the Code, or by such rule of practice, to be stated for that purpose.

The plaintiff had ample time to give the regular notice of motion, and therefore there was no occasion for the order to show cause, and the same was improperly granted, and should therefore be vacated.

It is claimed, however, that even although the order to show cause should be vacated, that the injunction embodied in the same order may stand. Without discussing that as a matter of practice, and as to whether, when both matters are so coupled together in the same order, the vacating of one portion does not cause the other to fall with it, it seems best to me to treat that branch of the matter upon its merits.

The plaintiff's action is entirely based upon the defendant's failure to file the sworn statement prescribed by section 41x of the Penal Code, and it is claimed that by his failure to do so, he has forfeited his office. So far as that section provides for the forfeiture of the office by failure to make and file the oath prescribed, it is repugnant to article XIII of the Constitution of the State of New York. That article after prescribing the form of oath to be taken by the members of the Legislature, and all officers executive and judicial, except such inferior officers as shall be by law exempted, concludes, "And no other oath, declaration or test shall be required as a qualification for any office of public trust."

The section of the Penal Code referred to is the requirement of an oath other than that prescribed by the Constitution as a condition for holding public office, and seems to me therefore to be in direct conflict with such Constitution.

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The principle involved in this case was directly passed upon in the case of People ex rel. Bishop v. Palen, 74 Hun, 289.

I cannot see any distinction in principle between that case and the one now under consideration.

That portion therefore of section 41x of the Penal Code that makes the failure to file the sworn statement therein prescribed a forfeiture of office, is repugnant to the Constitution, and void.

For these reasons, the order to show cause is vacated, and the injunction dissolved, with ten dollars costs of motion.

Order to show cause vacated and injunction dissolved, with ten dollars costs.

Matter of the Application of EDWARD J. TOOLE for a writ of mandamus *v.* WILLIS L. OGDEN et al., constituting the Municipal Civil Service Commission of the City of New York and JOHN N. PARTRIDGE, Police Commissioner.

(Supreme Court, Kings Special Term, January, 1903.)

Office — De facto incumbent entitled to the salary.

A police captain of the city of New York, duly appointed from the eligible list of sergeants as certified by the city civil service commission, carried on the rolls of the department as captain and recognized and paid by it as such for fifteen months, may compel the said commission and the city police commissioner to certify him on the monthly pay-rolls of the department as captain and entitled to salary as such.

The contention, that the police commissioners who appointed the captain falsely certified, in his favor, to the said civil service commission, his record on the police force and thereby obtained for him too high a place on the eligible list, goes only to the tenure of his office; and, assuming that he can be ousted therefrom at all, he is entitled to his salary until ousted by an action brought by the attorney-general.

THIS is an application for a peremptory writ of mandamus to compel the members of the municipal civil service commission and the police commissioner of the city of New York to certify

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the petitioner on the monthly pay-rolls of the police department as a captain of police and entitled to the salary of that office.

There were seventeen similar cases by captains of police argued at the same time.

William C. DeWitt and Abraham I. Elkus for petitioners.

Walter S. Brewster for respondents.

GAYNOR, J.: There were seventeen other cases argued with this one, and as all of the cases are identical they will be decided together.

Instead of being lean of adjectives, as law and practice require, the petitions abound in them, and also in allegations of legal conclusions. The following hard facts can be made out from them, however, viz.: The petitioners were sergeants of police. The municipal civil service commission made up an eligible list of sergeants for promotion to the office of captain of police. The petitioners were on the said list. There was a large number of vacancies in the office of captain. The police commissioners made a requisition on the said civil service commission for names of sergeants from such eligible list out of which to make appointments to fill such vacancies. The civil service commission certified from such eligible list the requisite number of names for the making of such appointments. The names of the petitioners were among those so certified. On December 27th, 1900, the police commissioners appointed the petitioners from such certified names to the said vacancies. They at once qualified and entered into their offices and were assigned to duty as captains. They have ever since done duty as captains, and have been addressed and ordered as captains by their superior officers, and by the four police commissioners who appointed them and the single commissioners who have succeeded them since January 1st, 1901. They were certified as captains on the monthly pay-rolls by the police commissioner and the said civil service commission, and paid their salaries as captains by the comptroller up to May 1st, 1902. The said police commissioner and civil service commission have ever since refused to so certify them on the pay-rolls, and in consequence thereof they have not been paid.

The answering affidavits are drawn in disregard of the well-

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known rule that affidavits in mandamus proceedings must consist of precise denials of fact and precise statements of fact only (Matter of Guess, 16 Misc. Rep. 306; Matter of Freel, 73 N. Y. St. Repr. 331). They are instead a mass of denials of conclusions of fact or law, and of statements of like conclusions. To strip them of their verbiage, and ascertain the facts which they are well calculated to conceal, is a task, but when it is done it is found that they leave undenied the facts stated above from the petitions. With equal difficulty it is found that the only fact stated in opposition is that when the civil service commission was making up such eligible list of sergeants, and called upon the police commissioners to certify the records in the police department of the sergeants who were examined, the police commissioners knowingly certified the records of these petitioners falsely in their favor, and that of the other sergeants falsely against them; and this, it is claimed, caused the petitioners to obtain an unfair rating on the eligible list, and hence to get certified for promotion to the office of captain ahead of others who would have preceded them if the records had been correctly certified by the police commissioners.

Conceding this to be so, it remains that the petitioners were appointed from the eligible list in the way prescribed by law to the office of captain, and are captains. The appointment was not void.

If their tenure is voidable, and they can be put out of their offices by an action by the attorney general of the State, let it be done, but until it is done they must be paid. It is not pretended that they participated in the fraud of the police commissioners, if there was any. Common honesty as well as the law dictates that while they are permitted to remain captains, and required to serve as captains, they must be paid the salaries of their offices. The learned counsel for the city has cited no authority justifying the refusal to pay the petitioners. The case is not like a case where there are contestants for an office. Even there payment to the *de facto* incumbent is the course usually followed, to the end that efficient public service may be obtained, and it acquits the municipal corporation of all further liability to any one for the salary; but here there are no contestants, and the refusal to pay is a sheer attempt to obtain the accepted and required services of the petitioners for nothing. What would be said of the morality of a private individual who should try to do the like?

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It is urged, however, that as a matter of discretion the petitioners should be remitted to an action at law for their salaries. If they should bring such actions it looks more than likely that they would be met with the plea that they could not bring them until the pay-rolls had first been certified. But however that may be, it seems to me a better exercise of discretion to grant the writs prayed for, to the end that the demoralization to the police force which, it seems to me, must be caused by such treatment of members thereof, be brought to an end.

The writs are granted.

JAMES HAUGHIAN, Plaintiff, *v.* LEWIS J. CONLON et al., as Executors, Defendants.

(Supreme Court, Kings Special Term, January, 1903.)

Jurisdiction — Of an action requiring executors to account — Rule in Second Judicial Department.

In the Second Judicial Department, the court of the surrogate and the Supreme Court are deemed to have equal jurisdiction of an action requiring executors of personalty to account, and the latter court cannot lawfully refuse to take or retain jurisdiction of such an action unless there is interposed, in bar thereof, a plea that a proceeding is pending in the former court involving the same subject matter.

SUIT to require the executors of the last will of Charles P. Haughian to account, and to appoint a receiver of the estate instead of such executors, the executors being charged with neglect and waste. The executors have nothing to do with the real estate of the deceased by the will.

George M. Curtis for plaintiffs.

James A. Wilson and Adolph Kiendl for defendants.

GAYNOR, J.: A motion was made to dismiss the complaint after the opening of counsel for the plaintiff, and denied with hesitation. The testimony on the plaintiff's side was then taken on the allegations of the complaint of neglect and misconduct against the defendants, and to enable the plaintiff to show some special reason

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for this court to hold jurisdiction of the case. This latter is not to be taken as a precedent in practice, for where the complaint shows no such special reason, evidence should not be taken on that head. At the close a finding was made that there was no such neglect or misconduct, and the prayer for a receiver was denied; and no such special reason was shown. The defendants then renewed the motion to dismiss on the ground already stated on the first motion, i. e., that the surrogate's jurisdiction extended to all of the matters presented by the pleadings and evidence, and that this court therefore ought not to entertain jurisdiction, there being no special reasons why it should.

Except for the decision of the Appellate Division in this judicial department in the case of *Ludwig* v. *Bungart* (48 App. Div. 613), I should say that this court ought not to entertain jurisdiction of the case. The rule was long understood by trial judges to be that this court would not entertain a suit for an accounting by executors unless the case had special features showing that a complete remedy could not be had in the Surrogate's Court, and that its powers needed to be supplemented by the fuller powers of a court of equity (Chipman v. Montgomery, 63 N. Y. 221; Wager v. Wager, 89 N. Y. 161; Strong v. Harris, 84 Hun, 314; Meeks v. Meeks, 34 Misc. Rep. 465; Ludwig v. Bungart, 26 Misc. Rep. 247). But in the said *Bungart* case the question was fully considered in the learned opinion written on appeal, and the rule was laid down that a court of equity could not refuse to entertain such a suit "unless the jurisdiction of the Surrogate's Court had already been invoked;" and it was further explicitly said: "The rule is that where both tribunals have equal jurisdiction, the cause should be retained and disposed of in the forum where judicial action was first sought." This is a plain decision, first, that although the statute has apparently specially assigned the Surrogate's Court as the place where the administration of the estates of deceased persons and the conduct and accounts of executors are to be controlled and settled, such court has no special jurisdiction in such matters, but only an equal one with the Supreme Court, and, second, that no discretion exists in the Supreme Court to refuse to entertain suits for accountings, and the like, in the administration of such estates, but it can dismiss such suits only on a plea in bar of the pendency of a proceeding in the Surrogate's Court involving the same subject matter.

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In the contemporaneous case of *Borrowe* v. *Corbin* in the First Judicial Department (31 App. Div. 172), the learned opinion certainly holds to the contrary; and the judgment in that case was affirmed "on opinion below" (165 N. Y. 634). But on the other hand, the Appellate Division in this department has, since such affirmance of the *Corbin* case, reaffirmed and followed its decision in the *Bungart* case, the opinion in that case being printed the second time, as though our reports were not growing fast enough (Steinway v. Von Bernuth, 59 App. Div. 261). Our reports are growing altogether too fast to suit our educated bar, whatever opinion on the subject may be entertained elsewhere. It is true that an accounting was pending in the Surrogate's Court in the *Corbin* case, but the decision was not placed on that ground.

It seems to me, therefore, that notwithstanding the insistance of counsel for defendants I should entertain the case.

The motion is denied, and let the account of the executors be filed.

GROVE D. CURTIS and WALTER F. BLAISDELL, Plaintiffs, *v.* THE NATALIE ANTHRACITE COAL CO., Defendant.

(Supreme Court, New York Trial Term, January, 1903.)

Corporation — Power of president to bind it — Ultra vires.

Where the selling agents of a coal mining company make advances to it necessary to the conduct of its business, the president of a successor company, which, on a foreclosure, of the property, took it and the assets over and continued the same relations with the agents, has power to bind his company to pay the agents their advances to the old company, there being some evidence that, from other sources than its president, knowledge of the assumption of the debt had been brought home to the successor company.

A corporation's plea of *ultra vires* should not be favored where it will work injustice to its debtors.

George C. Austin, for plaintiff.

Leonard D. Baldwin (Arthur J. Baldwin, of counsel), for defendant.

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BLANCHARD, J. This case is submitted upon practically an agreed statement of facts, motions for a direction of a verdict having been made by both parties at the close of the case. It appears that the plaintiffs had carried on for a number of years certain business relations with the Penn Coal Company, defendant's predecessor in the business it now conducts. The plaintiffs, through whom most of the coal mined by the Penn Coal Company was disposed of, advanced certain sums of money to the Penn Coal Company by means of acceptances of shipments of coal, which shipments had not been received or sent at the time of these acceptances being given, but upon which the Penn Coal Company was able to realize. Foreclosure proceedings were instituted against the Penn Coal Company in 1892, and the property was finally sold at the close of the year 1894, and title to all assets and property of the Penn Company became vested in the defendant, a new company organized for the purpose of taking over this property. The officers and directors were the same in both the Penn Company and the Natalie Company, and the parties interested were the same in both. When this change in the ownership of the mining property became known to the plaintiffs, a conversation occurred with the president of the defendant company, wherein the plaintiffs were advised that their account was perfectly good and would be cared for by the new company and that the business relations would continue as of old. The old method of transacting business was continued, and the dispute now arises as to the condition of the account between the parties — this depending upon whether or not the president of the defendant had the right to bind the Natalie Company in assuming the obligation of the Penn Company to the plaintiffs — there being no dispute as to the fact that the president did agree to the assumption of the debt of the old company. The president was the party with whom plaintiffs' dealings were always had. He was the representative of the defendant in New York and its only officer located here. It is true no action was taken by the board of directors of the defendant company assuming the obligation of the Penn Company, but on the other hand no action was taken by the board in reference to the acceptances which were supplied by the plaintiffs, and there is some evidence to show that knowledge of the fact of the assumption of the obligation of the Penn Company was brought home to the defendant company through other sources than its president. I believe that,

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in view of all the circumstances of this case, I am justified in holding that the action of the defendant's president was binding on the company. Kraft v. Freeman Printing & P. Assn., 87 N. Y. 628, 629; Quee Drug Co. v. Plaut, 55 App. Div. 87, 90; Cone v. Empire Plaid Mills, 12 id. 314, 317; Hall v. Herter Brothers, 90 Hun, 280. The further claim is made by the defendant that the action of the president, even though binding upon the company, is *ultra vires,* as the defendant by its charter was not authorized to assume obligations of another company. The plea of *ultra vires* is not looked upon with favor when it will not advance justice (Whitney Arms Co. v. Barlow, 63 N. Y. 62, 69), and in my judgment it would work a gross injustice to the plaintiffs were this plea permitted to prevail. It has been held that a corporation dealing in manufactured goods may, as a proper incident of its business, make advances to a manufacturer (Holmes v. Willard, 125 N. Y. 75), and so I shall hold in the present case that it was not beyond the scope of the business of the defendant to assume an indebtedness of its predecessor to the plaintiffs with whom the old relations were continued and from whom it received advances of money necessary for the conduct of its business. The plaintiffs should have judgment, under the stipulation, in the sum of $5,472.88, together with costs and an extra allowance of five per cent.

Judgment for plaintiffs, with costs and extra allowance of five per cent.

THE PEOPLE ex rel. LOUISE JOYCE, Relator, *v.* THE NEW YORK MAGDALEN BENEVOLENT SOCIETY, Respondent.

(Supreme Court, New York Special Term, January, 1903.)

New York city — Commitment of a female under L. 1886, ch. 353.

A magistrate of the city of New York may, under L. 1886, ch. 353, commit a female, over twelve years of age, charged by her mother with wilful disobedience to her, found guilty of being in danger of being morally depraved, and who has not been an inmate of the penitentiary, to one of the three institutions named in the statute, but he cannot lawfully commit her to any other institution or to the New York Magdalen Benevolent Society.

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WRIT of habeas corpus.

R. J. Robeson, for relator.

M. C. Addoms, for respondent.

GILDERSLEEVE, J. This is a writ of habeas corpus to review the commitment, by a city magistrate, of one Louise Joyce to the New York Magdalen Benevolent Society, "during her minority, unless sooner discharged by the trustees or managers thereof." It appears from the commitment that the relator is a girl of eighteen years of age, and was charged by her mother, before the magistrate, with "being found the associates of prostitutes, living with a man not her husband, and in danger of becoming morally depraved." The commitment further recites that she was found guilty of being "in danger of becoming morally depraved," but is silent as to the other features of the charge above quoted. The commitment also states that the relator "has not been an inmate of the penitentiary," and that she was committed, as aforesaid, by virtue of the provisions of chapter 410 of the Laws of 1882, as amended by chapter 353 of the Laws of 1886.

This statute reads as follows, viz.: "Whenever any female, over the age of twelve years shall be brought by the police, or shall voluntarily come before a committing magistrate in the city of New York, and it shall be proved to the satisfaction of such magistrate by the confession of such female, or by competent testimony that such female is * * * frequenting the company of * * * prostitutes, * * * or is willfully disobedient to parents, * * * and is in danger of becoming morally depraved; * * * and has not been an inmate of the penitentiary, such magistrate may judge that it is for the welfare of such female that she be placed in a reformatory, and may thereupon commit such female to one of the following reformatory institutions, viz.: * * * Every commitment * * * shall also state the term of the commitment, which, if the female so committed is an adult, shall be six months, or, if such female is a minor, during her minority, unless sooner discharged by the trustees or managers of such institution, provided, however, that no commitment made under this act, which shall recite the facts upon which it is based, shall be deemed or held to be invalid by reason of any imperfection or defect in form."

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While the rule is well settled that, where a magistrate of this city had jurisdiction of the charge and authority to impose the sentence, the Supreme Court will not review the conviction upon writs of habeas corpus or certiorari, still, if the statute does not confer upon the magistrate the power to commit the relator to this particular reformatory institution, such commitment should not be allowed to stand.

In the case at bar, it appears that the relator is willfully disobedient to her mother, who made the charge upon which she was committed, and is in danger of becoming morally depraved. The magistrate, therefore, had jurisdiction of the charge, under the statute above quoted. This statute, however, does not specify the "New York Magdalen Benevolent Society" among the institutions to which the magistrate could commit the relator, under the charge upon which she was found guilty. The nearest approach to that name is the "Magdalen Female Benevolent Asylum and Home of Fallen Women," but no reason is here shown for supposing that that institution is the same as the "New York Magdalen Benevolent Society."

Section 707 of the charter, as urged by the counsel for the society, provides that if a person, convicted on a charge of vagrancy, be a prostitute between the ages of sixteen and twenty-one, the magistrate may commit her, for not more than one year, to the "New York Benevolent Society." The relator, however, was not convicted of vagrancy. She was expressly committed, as shown by the commitment, under the provisions of the Laws of 1886, chapter 353, which provides, as we have seen, that where the female is willfully disobedient to her parent, and is in danger of becoming morally depraved, she may be committed to one of certain specified reformatory institutions. The commitment shows, as already stated, that the charge was made by the mother, and the exact language of the finding of the magistrate as to the facts is as follows, viz., "that the said female * * * on that day last aforesaid (*i. e.*, October 17, 1902) was in danger of becoming morally depraved, in violation of the laws aforesaid, (*i. e.*), chapter 410 of the Laws of 1882, as amended by chapter 353 of the Laws of 1896."

No consideration of the benefit to be derived by the relator herself, by being compelled to remain in the care of the New York Magdalen Benevolent Society, can be given weight here, as the

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sole question to be determined is that of the authority of the magistrate to impose the sentence.

The statute gave him the power to commit the relator to one of three specified institutions, and he exceeded his authority by committing her to another institution not mentioned in the statute.

The writ must be sustained, and the prisoner discharged.

Writ sustained and prisoner discharged.

THE PEOPLE ex rel. ELIZABETH CRAIGE, Relator, *v.* FRANK FOX, as Warden of the Workhouse, Respondent.

(Supreme Court, New York Special Term, January, 1903.)

New York city — Prostitution in a tenement house — Negligible error in the commitment — Release from detention under L. 1901, ch. 466, § 710.

A commitment of a woman to the workhouse on Blackwell's Island as a vagrant, for having committed prostitution in a tenement house in the city of New York, is not invalidated by an erroneous recital therein that she was committed under a certain title and section of the city charter when the same section and title of the Tenement House Act should have been named instead.

Semble, that where such a vagrant claims, upon the hearing of a writ of habeas corpus taken out by her, that she is being illegally detained because entitled to the benefit of that provision of the charter (L. 1901, ch. 466, § 710), which requires the city commissioner of corrections, within three days after her commitment, to ascertain from the records whether, within two years, she has been guilty of public intoxication, disorderly conduct or vagrancy, and, if it is her first offense, discharge her in five days, she must, in order to raise that question, traverse the return to the writ by alleging a state of facts warranting her discharge under said section.

WRIT of habeas corpus.

Charles J. Campbell, for relator.

Henry G. Gray, Assistant District Attorney, for respondent.

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GILDERSLEEVE, J. This is a writ of habeas corpus to review the commitment by a city magistrate of one Elizabeth Craige, charged with being a vagrant, by reason of having committed prostitution in a tenement house, in this city, to the workhouse on Blackwell's Island for six months, "unless sooner discharged by due course of law."

It is well settled that a woman violates the Tenement House Act (Laws of 1901, chap. 334, § 141), and shall be deemed a vagrant, if she commits prostitution in her apartment or room in a tenement house, in the city of New York; and that where a magistrate of the city has found the fact of her prostitution in such tenement house, his commitment of her will not be reviewed on writs of habeas corpus and certiorari, where he had jurisdiction of the charge and authority to impose the sentence (see People ex rel. Eisen v. Flynn, 37 Misc. Rep. 90, and cases there cited). The charter (Laws of 1901, chap. 466, § 707) confers upon the magistrate the power of committing such vagrant to the workhouse on Blackwell's Island.

There is no pretense that the magistrate did not have jurisdiction of the charge in the case at bar and authority to impose the sentence. In the commitment, however, the magistrate stated that it was "pursuant to title III, section 141, of the Greater New York Charter," whereas, in point of fact, it was pursuant to title III, section 141, of the Tenement House Law, supplemented as to the form of punishment by section 707 of the charter. I do not think that this misquotation is of sufficient importance to invalidate the commitment, for, as we have seen, the magistrate was unquestionably clothed with power to commit the relator to the workhouse, upon finding her guilty of the charge above stated. Laws of 1901, chap. 334, § 141; Laws of 1901, chap. 466, § 707; People ex rel. Eisen v. Flynn, *supra*.

The counsel for the relator refers me to section 710 of the charter, which requires the commissioner of corrections, within three days after the commitment of the vagrant, to ascertain from the records whether or not it is a first conviction "after January 1, 1902, and within two years next preceding the date of such commitment;" and, if no previous convictions appear, to make an order directing that the vagrant be discharged at the expiration of five days from the date of the commitment, which order, however, is not effective without the written consent, indorsed thereon, of

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the committing court or magistrate. There is nothing before me in this case to indicate whether or not the commissioner has made any such order, nor even whether the facts would warrant the making of such an order, assuming that the commissioner has made an examination to ascertain whether or not this relator has been previously convicted.

As was well stated by Mr. Justice Greenbaum, in the case of People ex rel. Edwards v. Warden, 37 Misc. Rep. 641, "If the relator claims that she is illegally detained because she is entitled to the benefit of section 710 aforesaid, it would be incumbent upon her to traverse the return by alleging a state of facts warranting her discharge under the provisions of section 710, and if on a hearing upon the issue thus raised, it was found that she was illegally detained she would be discharged from the custody of the warden."

No such issue is here presented. We have merely a question of the validity of the commitment to be determined in the case at bar.

The writ is dismissed and the prisoner remanded.

Writ dismissed and prisoner remanded.

MARY S. VAN WINKLE, Plaintiff, *v.* ELIZABETH M. VAN WINKLE et al., Defendants.

(Supreme Court, New York Special Term, January, 1903.)

Deed — Boundary.

A conveyance of land, bounded by an existing road, is presumed to carry the fee to the center thereof and express words, limiting the grant to the margin thereof, are necessary to overcome the presumption.

The presumption is strengthened where the deed discloses an intention upon the part of the grantor to dispose of all of his estate in the land and where it is sold by reference to a map which shows the road as existing.

ACTION for the partition of a plot of land included in the roadbed of a former lane, known as Apthorpe's or Jauncey's Lane.

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The complaint alleged that the plaintiff and the defendant Elizabeth M. Van Winkle were seized and possessed in fee as tenants in common of the premises described. The complaint further alleged that Charles Ward Apthorpe in 1763 was the owner of about 200 acres of land which included the premises in question and which was called "The Apthorpe Farm" through which a lane known as "Apthorpe's" or "Jauncey's" lane was laid out; that he died intestate in 1797 and that the lane was then and continued to be used as a public road until it was closed by act of law in the year 1867. In 1785 Charles Ward Apthorpe mortgaged the whole of said farm, including the roadbed of said lane, to secure the payment of $2,500 and interest. In 1797 Charles Ward Apthorpe died intestate and seized of said farm and lane subject to said mortgage, leaving nine children and two grandchildren, the children of a deceased daughter. In 1798 the mortgagee foreclosed the mortgage making all said children parties, and also Robert Troup as administrator, of Charles Ward Apthorpe. In 1799 Hugh Williamson became seized and possessed of the whole of said farm, including the roadbed of said lane, as grantee from the sheriff on said foreclosure sale and by the consent of all the parties to the foreclosure suit, the purchase money paid by Williamson, and amounting to about $51,500, was paid to the administrator of Charles Ward Apthorpe. The complaint further alleged that the defendants who were descendants of Charles Ward Apthorpe claimed to have some interest in the premises sought to be partitioned "the exact nature of which is unknown to this plaintiff except as is hereinafter set forth and which is a cloud upon the title of the plaintiff and of said defendant Elizabeth M. Van Winkle to said premises." The answers of the claimant-defendants set up on information and belief that at the time of the conveyance to Williamson he was attorney or agent for the heirs at law of Charles Ward Apthorpe and that he took and held the conveyance on their behalf and afterwards conveyed the said premises to said heirs at law. (Hugh Williamson, on November 16, 1802, as sole grantor made deeds of lots Nos. 6 and 8, which were designated on a map that was offered in evidence. On November 30, 1802, releases were made in which all the heirs at law of Charles Ward Apthorpe joined with Hugh Williamson, of the same lots Nos. 6 and 8 which were conveyed by the

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same descriptions as in the deeds of November 16, 1802.) Upon the trial the deeds of the adjoining lands made by Williamson individually, and also by him as on November 30, 1802, were put in evidence — the claim of the plaintiff thereon being that the title passed by Williamson's individual conveyance and included the cross road, and the claim of the defendants, the heirs of Apthorpe, being that these deeds by their recitals were conclusive as to the ownership by the children of Apthorpe of all the land of which the latter died seized and excluded the cross road, and that if they did include the road the subsequent deeds by the grantees did not. The deeds, of November 30, 1802, in form partition deeds, in which all the children of Apthorpe and Williamson joined, contained the following clause: "Whereas, the said parties of the first and second parts are the proprietors as tenants in common of all the real estate of which Charles Ward Apthorp, late, &c., died seized at Bloomingdale aforesaid, and whereas, the said parties of the first and second parts, as proprietors of the said real estate, did, by virtue, &c., proceed to make partition of said real estate among themselves, now, therefore, this indenture witnesseth that in order to carry the said partition into effect as to the said party of the second part by enabling her to hold and enjoy the said lot of land to her, etc., in severalty, etc."

The descriptions of the lands conveyed upon the road were as follows: Deed to William Jauncey and Mary Jauncey of August 1, 1799: "Beginning at the corner of a field at the junction of the Bloomingdale Road with a cross road that leads to Harlem; thence running along the Bloomingdale Road (thence south — thence east —); thence north 36 degrees E. 8 chains 92 links; thence N. 53 degrees W. 26 chains to the beginning, containing 42 acres and 5 perches, according to a map made by Benjamin Taylor, one of the city surveyors of the City of New York, and hereunto annexed."

Deed to Anne Apthorpe of November 30, 1802: "All that lot of land situate at Bloomingdale in the Seventh Ward of the City and County of New York, distinguished by the lot number eight: Beginning at a stake by the fence on the public cross road, the corner of Mr. Jauncey's land; thence * * * to the public road; thence north fifty-three degrees thirty minutes west along the public road five chains and fifty links

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to the place of beginning, containing eleven acres and eleven perches."

Deed from Anne Apthorpe to Philip Brasher and Silvanus Miller of March 13, 1806: "All that certain lot, etc., beginning at a corner formed by Mr. Jauncey's fence and the cross road leading to Harlem (thence south, thence east,) thence North, forty-four degrees East, seventeen chains thirty links to a mark on the fence and a sapling by the public road: Thence along the road, North fifty-three degrees thirty minutes West five chains fifty links, to the place of beginning; containing twelve acres, one rood, and eighteen perches."

Deed to Charlotte Vandenheuvel, of November 30, 1802: "All that certain Lot of Land situate at Bloomingdale in the seventh ward of the city and county of New York distinguished by Lot Number six Beginning at a Stake by the fence on the Cross road, leading to Haarlem fifty Links, from the South Eastern Corner of the fence, thence running North forty five Degrees East, parallel to the boundary fence, ten Chains sixty five Links, to Lot Number five, thence along the Southern boundary of Lot Number five, North, fifty three Degrees, fifty minutes West, fourteen Chains ten Links, to the Eastern boundary of Lot Number four, Thence by Lot number four, South, forty-three Degrees West ten Chains sixty Links, to the Public Road; then South fifty three Degrees, thirty minutes East along the road thirteen Chains Eighty Links to the place of beginning, containing fourteen Acres, three Roods, ten Perches."

Release by heirs of Charlotte Vandenheuvel to Maria E. Hamilton, of May 20, 1835, following an allotment by commissioners in partition: "beginning at a point at the North Westerly corner of the eighth avenue and a lane or road leading from the Blomingdale road to the Harlem Commons and which lane or road forms the southerly boundary line of the tract of land in question in this cause, thence running northwardly along the said eighth avenue six hundred and sixty one feet and eight inches to the south-westwardly corner of said avenue and an intended street laid out on the map of the commissioners of streets and avenues as ninety-sixth street, thence westwardly along the southerly side of said intended ninety-sixth street, four hundred and eleven feet, thence southwardly and paralled to the said eighth avenue, six hundred and forty four feet and eight inches, to a

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point on the aforesaid lane or road distant four hundred and eleven feet and three inches, westwardly from the place of beginning, and thence eastwardly along said lane or road four hundred and eleven feet and three inches to the place of beginning."

The claimant-defendants' claim on the trial was, first, that neither the deeds nor the releases conveyed the roadbed of the lane; and, secondly, that Hugh Williamson took title as trustee for the heirs of Apthorpe. On a trial of this latter question before a jury, the jury found that Williamson did not act as agent or trustee and did not take and hold the title in his name for the benefit of the heirs of Charles Ward Apthorpe, and further that after he became the grantee he did not dispose of the property at their request or for their use and benefit. The claimant-defendants made a motion for a new trial before Mr. Justice O'Gorman of these issues found by jury, which motion was denied. The defendants also contended that the action for partition was improper and should have been an action to determine adverse claims.

Edward Mitchell, for plaintiff.

William Mitchell (Henry F. Miller, of counsel), for defendant Elizabeth M. Van Winkle.

James A. Deering, for other defendants.

O'Gorman, J. Hugh Williamson's title to all the premises in question is not disputed, and there is no reason to doubt that his title was absolute and unqualified. No conveyance from him to the Apthorpe's heirs has been proved, and the contention that such a conveyance must be presumed cannot prevail. The deeds in which the Apthorpe heirs joined were intended only as confirmatory deeds so as to operate by way of estoppel against claims that might thereafter be made by them or their descendants. If, therefore, the deeds in question were held to exclude the center of Apthorpe's lane, it would follow that the title to the roadbed is still in Hugh Williamson or his heirs and not in the claimant defendants. I am of the opinion, however, that the conveyances carried the grant in each instance to the center of the road. The presumption is that a conveyance of land bounded by an existing street or road carries the fee to the center, and in case of ambiguity the

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construction most favorable to the grantee must be adopted. Matter of Ladue, 118 N. Y. 213. Nothing short of express words explicitly excluding the highway can have the effect of limiting the grant to the margin. Am. & Eng. Ency. Law (2d ed.), 809; Matter of Mayor, 20 App. Div. 404; affd., 155 N. Y. 638; Potter v. Boyce, 73 App. Div. 383. The lots in question were sold by reference to a map, and the recital in the confirmatory deeds of a purpose to dispose of the entire estate clearly establishes that the conveyances extended to the center line of the abutting lane. Bissell v. N. Y. C. R. R. Co., 23 N. Y. 61. In none of the descriptions is reference made to the side of the road. The words "Beginning at a stake by the fence on the cross road," considered with the remainder of the description, do not necessarily indicate an intention to confine the grant to the side of the roadway. I find nothing in the deeds in question sufficient to overcome the presumption against the grantor's intending to reserve the title to the soil of the highway, and I conclude that the defendants, other than the defendant Van Winkle, have no interest in or title to any part of the premises in question. Let a judgment be entered accordingly. The motion to set aside the findings of the jury and for a new trial is denied, with costs.

Judgment accordingly.

Matter of East One Hundred and Fifty-eighth Street.

Matter of Lyman Place.

Matter of East One Hundred and Seventy-third Street.

(Supreme Court, New York Special Term, January, 1903.)

New York city — Interest on an award, for property condemned, where title to it vests in the city before confirmation of the commissioners' report.

Where the board of public improvements of the city of New York has by resolution declared that title to property to be taken for city purposes by commissioners of estimate and apportionment shall vest in the city before confirmation of their report, the city charter (L. 1897, ch. 378, § 90), authorizes them to allow, and include in their

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assessment for benefit, interest on the value of the said property from the date of its vesting in the city to the date of their report.

This declaration of the rule of damages is one within the power of the Legislature.

OBJECTION to the confirmation of the commissioners' reports in each of above entitled proceedings.

George L. Rives, Corporation Counsel (John P. Dunn and Thomas C. Blake, of counsel), for commissioners.

John C. Shaw, for property-owners.

SCOTT, J. The objection to the confirmation of the commissioners' reports in each of these proceedings raises a single question, but one which is of great importance both to the city and to property-owners. That question is whether, in condemnation proceedings under the present charter of the city, where, by resolution of the appropriate board, title to the property to be acquired has vested in the city before the confirmation of the commissioners' report, the commissioners of estimate and assessment are authorized to include in their assessment for benefit interest on the valuation of the property from the date of the vesting of title to the date of their report. It has been held in proceedings conducted under the Consolidation Act (L. 1882, ch. 410), and in proceedings begun under that act and concluded under the charter, where the title vested in the city before the adoption of the charter, that the commissioners could not properly include such interest in their assessment for benefit. Matter of Mayor, 40 App. Div. 452; Matter of East One Hundred and Seventy-fifth St., 49 id. 114. In each of these cases, however, the Appellate Division expressly declined to pass upon the question now presented, which is, therefore, one of first impression. The direction as to what moneys should be assessed upon the benefited property under the Consolidation Act was contained in section 1002, which said: "All moneys paid under the provisions of this title (as to street openings) by the mayor, aldermen and commonalty aforesaid, shall be assessed equally and proportionably as far as the same may be practicable, upon

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the lands and premises benefited by the improvement," etc. This section is substantially re-enacted in the present charter. L. 1897, ch. 378, § 1003. At the time of the adoption of the Consolidation Act, and until 1893, the city could not acquire title to the property required until the confirmation of the report of the commissioners of estimate and assessment, and were not required to pay therefor until the expiration of four calendar months thereafter. Under this statute it was the duty of the commissioners to include in the awards for the lands taken not only its actual value at the date of the report, but also a sum equivalent to the interest upon that value for the four months which must elapse before the city could be called upon to pay. Detmold v. Drake, 46 N. Y. 320; Hamersley v. Mayor, 56 id. 536. The assessment for benefit included the whole sum allowed to the property-owner for his land, and, therefore, necessarily included not only the actual value of the land at the time of the report, but something in addition thereto for interest. The amendment to the Consolidation Act, by chapter 660, Laws of 1893, worked a substantial change in the law as to the acquisition of title to property for street purposes. The devolution of title upon the city was no longer necessarily postponed until the confirmation of the commissioners' report, and the board of street opening and improvement was empowered to provide, by resolution, that title to the property to be taken should vest in the city at a date to be fixed by it, anterior to the date of confirmation of the report. In proceedings in which such a resolution was adopted it was the duty of the commissioners to appraise the value of the land taken as of the date that title vested in the city, but since that value alone would not afford full compensation to the owner, it was provided that the city should pay him the value thus fixed, with interest thereon from the date when title to the lands had vested in the city. As was pointed out in Matter of East One Hundred and Seventy-ninth St., *supra,* it would be impossible for the commissioners to include this interest in their assessment, because they had no means of foretelling when the city would pay the principal. It was this impossibility, of ascertaining in advance how long the payments of awards would be delayed, and, therefore, how much interest would accrue, that made it impracticable to assess any part of the interest upon the benefited property under the provisions of section 1002 of the Consolidation Act.

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The framers of the new charter, doubtless having this difficulty in mind, undertook to divide the interest upon deferred payments into two parts, treating so much as accrued from the date of the vesting of title until the date of the commissioners' report as a part of the compensation paid to the owner whose property is taken, and so much as accrues after the date of the report as damages to be paid to the property-owner for deferring his payment. Section 990 of the charter provides that: "In such cases interest at the legal rate upon the sum or sums to which the owners, lessees, parties or persons are justly entitled upon the date of vesting of title in The City of New York, as aforesaid, from said date to the date of the report of the commissioners shall be allowed by the commissioners as a part of the compensation to which such owners, lessees, parties or persons are entitled." This is a legislative declaration as to the rule of damages to be applied by the commissioners, and was one within the powers of the Legislature to adopt. The city could not be authorized to take private property without making just compensation therefor, but the manner in which that compensation is to be ascertained and fixed is a question for legislative determination. It has chosen to say that the value shall be deemed to be the value at the time of taking plus the interest to the date of the report. When the value at the time of vesting of title has been ascertained, the computation of interest to the date of the report can be easily and exactly made, and no impossibility confronts the commissioners such as was held in Matter of East One Hundred and Seventy-ninth Street to render it impracticable to include interest in the assessment. Nor is it apparent how any injustice is done to the owners of benefited property by the inclusion of this interest in their assessment. The rule of damages which applies when the title does not vest until the confirmation of the report is that the value shall be fixed as of the date of the report; by which time, in ordinary cases, the value of the property is likely to be greater than at any earlier date. Assuming that the assessed property is to be benefited by the improvement, and it is only upon that assumption that it can legally be assessed at all, it begins to enjoy the benefit as soon as the improvement is completed, and the longer the completion is delayed, the longer is the enjoyment of the benefit postponed. The purpose and effect of vesting title in the city before the commissioners of estimate have completed their work and had their report con-

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firmed is to advance by so much the completion of the contemplated improvement, and consequently advance by an equal length of time the enjoyment by the assessed property of the benefits resulting from the improvement. The power given to the city to acquire title to property required for a needed improvement in advance of the ascertainment of the compensation to be paid is a power given primarily and principally for the advantage of the owners of benefited property, and, under the rules operative in this city as to the payment, through assessment, for such improvements, there is no injustice in assessing upon the benefited property the full compensation awarded to the owners of the property taken for the improvement. That compensation the Legislature has determined shall be the value at the time of taking, plus interest thereon to the date of the commissioners' report.

The objection must be overruled and the reports confirmed.

Objection overruled and reports confirmed.

THE PEOPLE ex rel. the TABER PRANG ART Co., Relator, *v.* JAMES L. WELLS et al., Commissioners of Taxes, Etc., Respondents.

(Supreme Court, New York Special Term, January, 1903.)

New York city — Limit of time to review, by certiorari, an assessment.

L. 1901, ch. 466, § 906, governs a certiorari to review or correct a final determination of the board of taxes and assessments of the city of New York and, within that section, such a proceeding is "begun" where, before the first day of November in the year in which the said determination was made, a petition for the writ is presented and an order for its issue is granted.

It is not requisite that the writ should be served before the said November first.

MOTION to quash a writ of certiorari.

Sutro & Wright (Theodore Sutro, of counsel), for relator.

George L. Rives, Corporation Counsel (E. C. Kindleberger, of counsel), for respondents.

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Scott, J. This is a motion to quash a writ of certiorari, and the single point involved is whether or not the proceeding was begun in time. Prior to the passage of chapter 466, Laws of 1901, amending the Greater New York charter, much discussion and some confusion had arisen as to the time within which certiorari proceedings to review an assessment for taxation must be instituted. It was held in a number of cases by the Appellate Division that the fifteen-day limit prescribed by section 251 of the General Tax Law did not apply, and it was generally held that the limitation of four months should be applied by analogy to the provisions of section 2125 of the Code of Civil Procedure regulating the procedure relative to the writs of certiorari provided for by the Code. This view has never been definitely adopted by the Court of Appeals. In People ex rel. Thomson v. Feitner, 168 N. Y. 441, the court expressly declined to pass upon it, but held as the writ had actually been issued and served within four months this, under the circumstances of the case, was sufficient. In People ex rel. Central Gas Co. v. Wells, where the writ was served many months after the confirmation of the assessment, the writ was quashed at Special Term and the order was affirmed at the Appellate Division and the Court of Appeals. No opinion, however, was written in either court and it is impossible to say whether the affirmance went upon the ground that the writ was applied for more than four months after the confirmation, or upon the ground that no definite time to apply for the writ was fixed by law, but that the relator had been guilty of gross laches, as clearly it had been. By chapter 466, Laws of 1901, the Legislature has undertaken to set the question at rest, by adding to section 906 of the charter, being the section providing for a certiorari to review the action of the tax commissioners, the following: "Such certiorari and all proceedings thereunder may be had and taken in the judicial district where such real estate is situated, and may be begun at any time before the first day of November in the year in which the determination sought to be reviewed or corrected has been made." In the present case the relator presented and filed his petition for the writ, and the court ordered the writ to issue on October thirty-first, but the writ was not actually served upon any of the respondents until November fifteenth. The writ is returnable on the first Monday of December. The question then is whether the proceedings were begun by the presentation and filing of the peti-

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tion, or whether in order to begin them it was necessary that the writ should actually be served before November first. Section 2125 of the Code of Civil Procedure provides that a writ of certiorari issued under the provisions of the article of which the section forms a part, must be granted and served within four calendar months after the determination to be reviewed becomes final and binding, and it is argued by the respondents that this section should be deemed applicable to writs issued under section 906 of the charter. The first observation which presents itself respecting this contention is that the language of the two sections is very different. The Code says nothing about the beginning of the proceeding. It merely provides that certain steps in the course of the proceeding shall be taken within the given time, to wit: that the writ must be both granted and served. It is well settled that the certiorari provided for by the General Tax Law and section 906 of the charter is an entirely different proceeding from the Code writ. If, therefore, reference is to be had to any other act than the section of the charter itself, to ascertain what the Legislature intended by the provision that the proceeding must be begun in a certain time, that reference should be had to the General Tax Law, which regulates in all other respects, the practice under writs like the present. Section 251 of that act, which establishes the statute of limitation of certioraris to review tax assessments, provides that the petition must be presented to a justice of the Supreme Court, or to the court within a specified time. So far as the general law is concerned, therefore, the presentation of the petition is deemed the commencement or beginning of the proceeding, and I see no reason to doubt that the intention of the Legislature is fully satisfied, and the charter complied with, if a petition is presented and the order granted for the issuing of the writ before the first day of November. That no definite time is fixed for the service of the writ, and that service may be delayed until very shortly before the return day, is unimportant, since the court has always power to enlarge the respondents' time to make return, a power which is commonly exercised with great liberality.

For these reasons I conclude that the proceeding was seasonably begun and the motion to quash must, therefore, be denied.

Motion denied.

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Matter of the Estate of HEMAN D. M. MINER, Deceased.

(Surrogate's Court, Chautauqua County, January, 1903.)

Surrogate's Court — Compelling part payment of conceded debts although the estate is insolvent and there has been no judicial settlement — Code C. P., § 2472, subd. 4, § 2722.

Where administrators of an estate have duly published a notice to its creditors to present their claims against it, and the time required for the publication of the notice has expired, and all the numerous claims presented are of equal dignity, and none are disputed by the administrators, and they know of very few claims that have failed to be presented, and they have funds applicable to some payment, the surrogate has power at the suit of petitioning creditors to direct the administrators presently to make a partial payment upon the petitioners' claims, and this although the estate is insolvent, and there has been no judicial settlement of the accounts of the administrators.

Where all the claims have been allowed by them, their surety cannot take the objection that non-petitioning creditors may on the judicial settlement succeed in procuring a disallowance of the claims of some of the petitioning creditors.

The surrogate, however, provided in his decree that the administrators might apply to have it modified in the event of its thereafter appearing that the estate was insufficient to pay the petitioning creditors the amounts thereby directed to be paid them, or in the event that any of the claims thereby allowed should thereafter be found invalid, in whole or in part.

APPLICATION, under section 2722 of the Code of Civil Procedure, by numerous creditors, for the payment of a *pro rata* share of their respective debts.

G. J. Dikeman, for petitioners.

Wm. S. Stearns, for administrators.

Love & Quackenbush, for surety of administrators.

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WOODBURY, S. The petitioners, sixty-eight in number, creditors of the above-named deceased, make this application for the payment of a *pro rata* share of their respective claims under the provisions of section 2722 of the Code of Civil Procedure. The facts, so far as they have any material bearing on the case, are not disputed.

Letters of administration were granted May 7, 1902. The administrators caused an inventory and appraisal of the personal property to be made, which was filed in the surrogate's office July 11, 1902, showing the value of the assets of the estate to be the sum of $100,220.40.

The decedent owned certain real property at the time of his decease which has since been sold, pursuant to a judgment of the Supreme Court, and the proceeds, amounting to $11,978.20, have been deposited with the treasurer of this county, subject to the order of this court; and the whole of such proceeds are available for the payment of decedent's debts.

So far as appears in this proceeding there is no other property belonging to the estate.

Pursuant to an order of this court the administrators caused to be published for six months a notice to creditors to present their claims, as required by the statute, the time of such publication expiring December 13, 1902. Claims have been presented to the administrators by about 485 different creditors, amounting, without interest, to $234,149.58, and with interest adjusted to December 31, 1902, to $239,989.39. Included in this amount are the claims of the sixty-eight petitioning creditors, whose claims, with interest adjusted to December 31, 1902, amount to $51,000 in round numbers.

At the time of his death, and for many years prior thereto, the decedent was engaged in conducting a private bank in the village of Fredonia. He was assisted in his business by his two sons, who are the administrators of this estate, and who are personally familiar with his business affairs in connection with the bank. Regular books of account were kept, such as are usual in banking institutions of this character, showing the transactions with the various creditors and patrons of the bank.

All the claims presented, aside from current expense accounts of about $150, arose out of transactions in connection with this banking business. They represent moneys on deposit with the de-

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ceased as a banker. All these claims, except the current expense claims, have been compared by the administrators with the books, found to correspond correctly therewith and have each and all been admitted and allowed by them as just and proper claims against the estate. The administrators know of no other claims against the estate, except possibly a few small debts which will not aggregate fifty dollars in amount. There are no claims in dispute and no litigation has arisen against the administrators. Upon the claims presented and allowed, as adjusted by the addition of interest to December 31, 1902, the administrators have, since the commencement of this proceeding, paid a dividend of twelve and one-half per cent.

On the day of the hearing of this proceeding, January 12, 1903, the administrators filed with this court an account of their proceedings in the administration of the estate; and from this account and the admissions and stipulations made by the administrators upon the hearing, it appears that they have realized from the personal property which came to their hands the sum of $95,205.28; that they have paid out for funeral expenses and expenses of administration, $1,309.66, and in making the dividend of twelve and one-half per cent. to creditors, $32,331.95 — altogether $33,641.61 — and that they now have on hand, in cash, $61,563.67, in addition to several thousand dollars inventoried value of assets. The petitioning creditors ask that they be paid their proportional part of this amount. No answer to this application was filed by the administrators, but upon the hearing they orally raised the objection, which was taken in the minutes, that judicial settlement should be had before this proceeding is passed upon so as to give all the other creditors of the estate who are not now in court an opportunity to come in and be heard with reference to their claims. The United States Fidelity & Guaranty Company, surety upon the official bond of the administrators, appeared upon the hearing and orally objected to the proceeding upon the ground that the estate is insolvent and that, therefore, judicial settlement of the accounts of the administrators is a condition precedent to any division of the assets among the creditors.

It may be conceded, for the purpose of disposing of the questions raised, that the estate is insolvent. With this concession in mind, and eliminating all questions, except those of merit based upon the objections, I am confronted with two propositions.

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First. Whether this court has authority to decree the payment of any part of a creditor's claim, where the estate is insolvent, in advance of a judicial settlement, and *second,* whether, if such authority exists, a case has been presented which warrants such payment under the circumstances disclosed in this case.

The second proposition is one which always arises in this class of proceedings and embraces the objection raised by the administrators, as well as other objections which might be raised, by reason of section 2722 of the Code of Civil Procedure, which requires a dismissal of the proceeding, " Where it is not proved, to the satisfaction of the surrogate, that there is money or other personal property of the estate applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction."

The administrators stand in the place, and are regarded as the representatives, of the deceased person for the purpose of adjusting and settling his business affairs and distributing his estate among those entitled thereto; and they are deemed to stand in the position of trustees for all the persons interested in the estate, whether as creditors, next of kin, or otherwise. It is their duty to ascertain and collect in the personal estate, ascertain and pay the debts and funeral expenses of the deceased, so far as the assets of the estate will warrant such payments, and distribute the remainder, if any, among the persons entitled thereto under the Statute of Distribution.

The statute — section 2719 of the Code — requires them to proceed with diligence to pay the debts of the deceased, and section 2718 of the Code describes the manner in which debts may be ascertained, by the publication of a notice such as has been published by the administrators in this case. This notice is for the protection of the administrators and the estate against the claims of creditors who are negligent in presenting their demands.

Creditors have two remedies for the adjustment of their claims against the estate of the deceased person. One is by action for the recovery of judgment against the administrators in their representative capacity, and the other is by the presentation of their claims to the administrators and the allowance of the same by the latter, or, in the event of a disallowance by them, a reference

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of the claim, which is the equivalent of an action for the recovery of judgment commenced by consent of parties.

The recovery of a judgment against the administrators would not entitle the debt to preference in payment over others of the same class. It would have the effect, however, of constituting it a liquidated debt against the estate. Code Civ. Pro. § 2719, Schmitz v. Langhaar, 88 N. Y. 503; Glacius v. Fogel, id. 435; Allen v. Bishop's Executors, 25 Wend. 414, 415.

In the process of adjusting claims against estates by presentation to administrators, the latter are permitted, by section 2718 of the Code, to call for the evidence of the validity of the claim in its support, and it is a plain duty imposed upon them by virtue of their office to examine respecting its validity as a claim against the estate, and, if found to be just and valid, allow it, or, if otherwise, reject and offer to refer it under the provisions of the statute.

Claims presented to administrators and admitted and allowed by them acquire the character of liquidated and undisputed debts against the estate. Lambert v. Craft, 98 N. Y. 342; Magee v. Vedder, 6 Barb. 352–354; Schutz v. Morette, 146 N. Y. 137. The latter case limits the rule laid down in the two former ones as regards the effect of mere silence and inaction of administrators on claims presented, but does not disturb the rule itself that the admission and allowance of the claim gives it the character of a liquidated and undisputed debt; but on the other hand it recognizes the rule and the effect of such action in holding that an executor may state an account of the dealings of his testator and an action on the account so stated will lie against him in his representative character.

The administrators having published a notice to creditors to present their claims against the estate as authorized by law, and the time of publication having expired, and every claim presented having acquired the character of a liquidated demand against the estate by reason of such admission and allowance, the administrators are clothed with authority to apply the moneys in their hands to the *pro rata* payment thereof, and the law will protect them in so doing, if they act in good faith, as against the claims of creditors which may thereafter be presented.

The administrators having failed to apply any part of this large sum of money in their hands — $61,563.67 — to the payment of

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the debts of the deceased, has this court authority to afford the petitioning creditors any relief? I may say in this connection, however, that the responsibility for the failure to apply these moneys to the payment of the debts of the deceased, at this time, apparently rests with the United States Fidelity & Guaranty Company, the surety upon the official bond of the administrators, which is exercising, with the administrators, a joint control over these funds, by its refusal to release them for such purpose.

The petitioning creditors are pursuing the only remedy available to them in this court, as a matter of right, at this time. The only other remedy which they could have is a proceeding to compel an accounting. This latter remedy is not available at this time for the reason that this court cannot compel a judicial settlement of the administrators' accounts until the expiration of one year from the issue of letters, which time will not expire until May 7, 1903. Code Civ. Pro., § 2726.

I am of the opinion that the remedy which these creditors are pursuing by this proceeding is available to them at this time and that they are not to be deprived thereof, and that this court is not ousted of jurisdiction in the premises to grant the relief prayed for by reason of the fact that the estate is insolvent. Mere insolvency of an estate is not sufficient to deprive the court of jurisdiction, and the relief should be granted if it appears that the rights of other creditors will not be injuriously affected thereby, within the rule applicable to such cases. To my mind the very apparent object of the statute is to enable creditors to obtain payment of their claims in whole or in part in advance of the settlement of the estate, and this is the view taken by the court in the case of Thomson v. Taylor, 71 N. Y. 217, under the provisions of the Revised Statutes, for which section 2722 of the Code is now a substitute, and which embraces the principle laid down in that case.

To hold that the court is without authority to decree partial payment of a creditor's claim in advance of a judicial settlement in all cases of insolvent estates would be to render this salutary provision of the statute nugatory in a large percentage of cases, and that irrespective of any question of merit in any particular case. The estate may consist wholly of money, or the entire estate may be converted into money within six months from the time of the appointment of an administrator. The administrator may

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have paid all funeral expenses and expenses of administration and have the balance of such moneys in his hands. He may have advertised for creditors and the time have expired and only one claim exist against the estate entitled to payment out of such moneys, and yet, if the administrator refuses to voluntarily settle his account such creditor will be absolutely powerless to compel the application of the moneys to the payment of his claim, in case of the insolvency of the estate, if the contention of the surety company is correct, until the expiration of one full year from the time of the appointment of the administrator because until that time no judicial settlement or accounting can be compelled.

I think the case of Thomson v. Taylor, *supra,* is an authority strongly tending to support the position that insolvency of an estate does not deprive this court of authority to decree partial payment of a debt in advance of a judicial settlement. That case arose under part 2, chapter 6, title 5, section 18 of the Revised Statutes, which empowered the surrogate to decree the payment of debts or a proportional part thereof, upon the application of a creditor at any time after six months from the issuing of letters. Judgment had been recovered in that case against an executrix and the surrogate had decreed payment thereof under the provisions of the statute quoted. The estate, as afterwards discovered, was insolvent. A provision was inserted in the decree that the executrix might apply for modification thereof in case it should afterwards appear that the estate was insufficient to pay all debts. The decree had not been complied with when the action was brought and when it was discovered that the estate was insolvent. Under such circumstances it was held that the decree was not conclusive so as to entitle the debt to priority of payment over other debts of the same class. The case discusses the authority of the surrogate to make the decree and its force and effect. Andrews, J., writing the opinion, says:

"The authority vested in the surrogate by 2 Revised Statutes, 116, section 18, to decree the payment by an executor or administrator of a debt owing by a deceased person, or a proportional part thereof, at any time after six months from the granting of letters testamentary, or of administration, and of a legacy or distributive share after the expiration of a year from that time, is to be exercised in conformity with, and not in hostility, to the general principle of equity among creditors, which is a distinguish-

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ing feature of the system for the administration of the estates of decedents enacted by the Revised Statutes. (2 R. S. 55, 27, 28; Fitzpatrick v. Brady, 6 Hill, 581.)

"The object of that section was to provide a way whereby creditors and others having claims against the estate of a decedent, or entitled to share therein, may obtain payment thereof, in whole or in part, in advance of the final accounting and distribution, in cases where such contemplated payment may be made consistently with the rights of all parties interested in the estate.

"When application is made by a creditor for the payment of his debt under this section, the surrogate, before making a decree therefor, must necessarily inquire as to the condition of the estate; the amount of the assets and of the debts. If it appears from the proofs presented, that the relief asked may be granted without prejudice to other creditors, the surrogate may make the decree, and the executor or administrator acting in good faith will be protected in paying the debt in full, pursuant to the decree, although it may finally turn out that by reason of losses, depreciation of values, or other causes, the remaining assets are insufficient to fully pay the other creditors. It is quite possible that this result may happen, and it often will happen, unless great care is taken by the surrogate in exercising this jurisdiction. The application under section 18 may be made before the executor or administrator has been able to ascertain, by advertisement, the amount of debts owing by the decedent, and many contingencies may happen to impair the value of the estate between the decree and the final accounting and distribution.

"The decree made in this case by the surrogate of New York, upon the application of Milton H. Thomson, that the executors of James B. Taylor pay his debt to the applicant in full, was regularly made under section 18; and if the executors had, in obedience to the decree, paid the debt, all parties would have been concluded."

As already stated, section 2722 of the Code is now a substitute for this provision of the Revised Statute, coupled with the power conferred upon the surrogate by subdivision 4 of section 2472 of the Code to enforce the payment of debts, and, I think, is no more restrictive than those provisions of the Revised Statutes. True, the second subdivision 2 of section 2722 was not then a part of our statutory law, but the provisions and safeguards therein con-

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tained are no more restrictive than the principle of equity laid down in that case to secure equality among creditors, which the court held must be applied in such cases, and this subdivision has been added simply as declaratory of the principle enunciated in that case. Matter of Application of Macaulay, 94 N. Y. 579.

The court in the Thomson case draws no distinction between solvent and insolvent estates as affecting the jurisdiction of the court to decree payment.

The statute at that time gave to an administrator a right to advertise for claims only after the lapse of six months from the time of the issuing of letters (2 R. S., chap. 6, tit. 3, art. 2, § 34, m. p. 88), and yet the application and decree for payment in whole or in part could be made at the expiration of six months from the time they were issued. Under the present provisions of the statute — section 2718 of the Code — the publication of notice to creditors can commence any time after the issuing of letters. I know of no way in the administration of estates to ascertain to a legal certainty whether an estate is solvent, or not, except by the publication of this notice. Still the right to make the application for payment in whole or in part is not made to depend on the question of the publication of the notice. It seems conclusive to me, therefore, that the solvency of the estate is not a condition precedent to partial payment or distribution, under the present statute.

Another reason which leads me to this conclusion is the provisions of section 1826 of the Code, relating to executions upon judgments recovered against administrators in their representative capacity. As already shown the effect of such a judgment is merely to give the debt the character of a liquidated demand against the estate, and, in this respect, claims allowed by the administrators attain the same character. Creditors holding such judgments have all the remedies for the enforcement of their claims possessed by creditors whose claims have been allowed by the administrators, and the further remedy by execution as prescribed in this section. I think this section clearly recognizes the right to allow execution for partial amounts (which is the equivalent of partial payments) from time to time as the disclosed conditions of the estate will warrant. I am of the opinion that it was not the intention of the Legislature to give creditors who have liquidated their claims by judgment any advantage in the collec-

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tion and enforcement thereof over other creditors of the same class whose claims have been liquidated through the process of allowance by the administrators, and to hold, that partial payments may be decreed under the circumstances which appear to exist in this proceeding, will harmonize the different provisions and remedies for the enforcement of payment of claims against estates and place all creditors entitled to equality of payment on the same basis.

I have examined the case of McKeown v. Fagan, 4 Redf. 320, cited by counsel for the surety company in support of their contention that the court has no authority to decree partial payment of a debt, in case of the insolvency of the estate, in advance of a judicial settlement. If this is what the learned surrogate in that case actually decided I cannot concur in his position. The facts existing in the case are not disclosed in the reported case, other than the mere fact that the estate was insolvent. I am inclined to the belief, however, that the surrogate merely decided that case upon the facts presented. I can readily concur in a position that, where the debts against an estate have not been ascertained by the publication of a notice as required by the statute and it appears that the estate is insolvent, a decree should not be granted until either a settlement is had or the debts have been ascertained and become liquidated demands against the estate. But, on the contrary, when the debts against the estate have been ascertained and become liquidated demands against the estate, and there is money in the hands of the administrators applicable to the payment of such claims either in whole or in part, as in this case, I not only think that the authority and jurisdiction of the court exist to decree partial payment but that the court should exercise such authority.

The question of jurisdiction having been disposed of the only remaining proposition is whether any part of the $61,563.67 remaining in the hands of the administrators can be applied to the payment of the claims of the petitioners without injuriously affecting the rights of other creditors. All claims against this estate are in the same class, and I am satisfied from the facts disclosed that this may be done with propriety. In reaching this conclusion I am not unmindful of the objection, raised by the surety company, that other creditors, who are not parties to this proceeding, may contest the claims of some of the petitioning

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creditors upon the judicial settlement of the accounts of the administrators, and that possibly some of these claims may be disallowed. I do not think this objection, if it may be so called, is tenable. The administrators have allowed these claims after having investigated them and they cannot now be permitted to object to their payment on that ground. They raise no such objections, and, in the absence of any evidence or claim of fraud, collusion or bad faith against the administrators in this connection, the surety cannot be heard to raise the objection. Under such conditions the surety stands in no better position in this respect than its principals, and is bound by their acts.

If such objection is tenable on the part of the principal, or the surety, on behalf of creditors it could be raised against every application of this character on behalf of next of kin or the surviving husband or wife and thereby defeat the proceedings and the statutory provision, and prevent the payment of any debt until an accounting had, and that whether the estate was insolvent or not.

The statute makes no provision for, nor does it contemplate the calling of these parties before the court upon such an application. The administrators are deemed to represent the interests of those parties in such proceedings and the application is to be heard and determined between the parties before the court.

Taking into consideration the conditions of the estate, the claims and rights of all creditors, the commissions of the administrators and future expenses of administration to be paid, an amount equal to twenty-two per cent. of the petitioners' claims, including interest as adjusted to December 31, 1902, can be safely paid and applied thereon without injuriously affecting the rights of any other creditors.

The proceeding commenced by the administrators for an accounting, with citation returnable thereon February 24, 1903, was commenced subsequently to this proceeding, and, consequently, cannot be held to affect the rights of the petitioning creditors to have a partial payment of their claims made at the present time. The proceeding for an accounting may and is likely to be delayed for several weeks beyond the date fixed for the return of citation by reason of investigations which creditors are proposing to make, respecting the assets of the estate, and by reason of the fact that in a case where there are 485 creditors, or

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upward, to be served with citations it is quite likely that an adjournment may be required to bring in creditors not served, and the representatives of those who may have died since the presentation of their claims.

The decree in this case will contain a provision that the administrators may apply to the court for a modification thereof, in case it shall hereafter appear that the estate is insufficient for the payment to the respective petitioning creditors the amounts therein directed to be paid, or in the event that any of the claims of the petitioning creditors as allowed are hereafter found to be invalid in whole or in part. A decree will be entered in accordance herewith, without costs to either party.

Decreed accordingly.

Matter of the Estate of ROBERT GRAHAM DUN, Deceased.

(Surrogate's Court, New York County, January, 1903.)

Transfer tax — Good will not taxable.

A transfer of the good will of a business is not subject to the transfer tax as in no view is good will real estate, and it is not "personal estate" or "personal property" within L. 1896, ch. 908, § 2, subd. 4.

APPEAL by the executor herein from the report of the appraiser, assessing and fixing the tax made on said report.

Rastus S. Ransom, for executor.

Julius Offenbach, for State Comptroller.

THOMAS, S. The decedent was, at the time of his death, engaged in carrying on business under the name of R. G. Dun & Co., and was the sole owner of that business. The appraiser designated for the purposes of the transfer tax included as an item of property assessed by him, "Good will of the business of R. G.

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Dun & Company, $2,000,000." The value of such good-will is conceded, and was, indeed, determined upon the consent of all the parties in interest, but the executor appeals from the order fixing the tax made on the appraiser's report, and insists that "good will" is not property, within the meaning of the Tax Law, and that a transfer of good-will, under a last will of a decedent, is not subject to the transfer tax.

By subdivision 4 of section 2 of chapter 908 of the Laws of 1896, known as the Tax Law, under the heading "Definitions," it is enacted that "The terms 'personal estate' and 'personal property,' as used in this chapter, include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; debts and obligations for the payment of money due or owing to persons residing within this state, however secured or wherever such securities shall be held; debts due by inhabitants of this state to persons not residing within the United States for the purchase of any real estate; public stocks, stocks in moneyed corporations, and such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate."

In People ex rel. Cornell S. Co. v. Dederick, 161 N. Y. 195, 210, it was determined that the good-will of a business is not real property, upon any theory, and that it is not personal property, as defined in this section, and is consequently not included as personal property liable to taxation.

The Appellate Division of the Supreme Court, in this department, has determined in Matter of Estate of Theodore Hellman, 77 App. Div. 355, that this definition is applicable to article X of the Tax Law, being that part of the law referring to taxable transfers. In that case it was held that a seat in the New York Stock Exchange, of the value of $65,000, was improperly included in the assessment of the property of a decedent, subject to transfer tax, because it was not covered by that definition, and that the decision to the contrary in Matter of Glendinning, 68 App. Div. 125; affd., 171 N. Y. 684, having been made as to a transfer which took effect prior to the passage of the Tax Law, and while the Transfer Tax Law of 1892 was in force, was not applicable.

Upon the authority of this decision the definition of the Tax Law must control, and the good-will of the business of the de-

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cedent was improperly included in the appraisal. The order appealed from must be reversed, and the matter remitted to the appraiser.

Order reversed and matter remitted to appraiser.

Matter of the Will of DAVID T. JENKINS, Deceased.

(Surrogate's Court, Oneida County, January, 1903.)

Will — Testamentary capacity — Delusion in regard to a wife's infidelity.

A will that is the offspring of a delusion should be set aside.

A person is under a delusion where he, without cause or evidence, firmly and persistently believes in, and acts upon, certain premises as existing facts when no such facts really exist.

Where a testator gave his dependent wife, of thirty years' standing, only the income for life on $1,000, and gave the rest of his property, amounting to $6,000 to his next of kin and charities, and it appeared that he, during nearly all of their married life had believed her to be, and had talked of her as, unfaithful to him — although there was no ground for the charge — the surrogate set the will aside at the wife's instance as produced by the testator's delusion in regard to her infidelity to him.

PROCEEDING for the probate of a will.

Frederick H. Hazard, for proponent, George C. Hazard.

Thomas S. Jones, for contestant, Mary A. Jenkins.

John E. Brandagee, for House of Good Shepherd.

Henry A. Davis, for Utica Orphan Asylum.

H. J. Cookinham, special guardian.

CALDER, S. David T. Jenkins, the testator, died in the city of Utica, on or about the 4th day of October, 1901, being about sixty-eight years of age and leaving a last will and testament, dated the 3d day of June, 1899, in which he sought to dispose

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of an estate of the value of about $7,000, consisting entirely of personal property.

His widow at the time of his death was about sixty-five years of age. They had four children, all of whom died in infancy. His next of kin are two sisters, a brother, nieces and nephews. The only legacy he bequeathed to his wife was the income upon the sum of $1,000 during her natural life. Practically one-half of his estate is given in equal portions to the House of the Good Shepherd of Utica, N. Y., and the Utica Orphan Asylum, and the other half is given to certain relatives and friends. The will is contested by his widow upon the ground that testator did not possess testamentary capacity to execute it. It was not claimed that he was insane upon all subjects, but that he had a delusion as to his wife's infidelity, and that such delusion entered into and controlled his testamentary act. He was able to talk in a rational way upon subjects in general, and took an intelligent part in certain business transactions. At different times he held positions of trust in his town.

A man may have a delusion and still possess testamentary capacity, provided, however, that the will is not the offspring of such delusion.

In the trial of this case a great amount of evidence was taken and it is not deemed necessary to analytically discuss it. At the time of the execution of this instrument offered for probate decedent and his wife had been married nearly thirty years, and for a greater portion of that period they lived upon a farm in the town of Marcy, his wife assisting in the usual duties of household work, and from the evidence it is fair to presume she did her full share towards accumulating some of the estate herein sought to be disposed of. Shortly after their marriage he began to talk with neighbors and friends about his wife's infidelity, and up to the time of his death made untrue allegations as to her character. The evidence emphasizes the fact, however, that during her entire life in the neighborhood where she lived her reputation for chastity was good and no suspicions were held against her. Untrue reports were circulated only by her husband. People with whom he talked endeavored to persuade him that he was mistaken, and insisted that his accusations against his wife were the creations of his own imagination, but in opposition to evidence and argument, he asserted in positive terms that his wife was guilty of immoral

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acts. A person has a delusion who believes that a certain state of affairs exists which in fact does not, and which can only be accounted for as the result of a perverted imagination, without cause or evidence. This was substantially held by this court in Matter of Lapham, 19 Misc. Rep. 77.

Bouvier defines a delusion as "a diseased state of mind in which persons believe things to exist which exist only, or in the degree they are conceived of only in their own imaginations, with a persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary."

In Seamen's Friend Society v. Hopper, 33 N. Y. 624, it is said: "If a person persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that case is insanity. Such a person is essentially mad or insane on those subjects, though on other subjects he may reason, act and speak like a sensible man."

Applying these definitions to the facts in this case it cannot be argued that testator had a mistaken belief or an unreasonable prejudice. It went beyond these. It was an insane delusion.

A will should be set aside where it is the offspring of, or its execution is controlled by, a delusion or delusions.

In Riggs v. American Tract Society, 95 N. Y. 503, it was held that it was sufficient to show that the donor was laboring under a delusion, out of which he could not be reasoned, which led him to make the gift in question and which so took possession of his mind that he could not act upon the subject sensibly.

In Matter of Gannon, 2 Misc. Rep. 333, the will was set aside by the jury and the judgment affirmed by the appellate court. The concluding portion of the opinion is as follows: The "jury found that Gannon had general testamentary capacity, was not a monomaniac on all subjects, but had an insane delusion affecting the will in question, and was a maniac on that subject, and that such mania influenced the making of the will. That conforms to the rule in this state." Matter of Loewenstine, 2 Misc. Rep. 323; Matter of Dorman, 5 Dem. 112; Matter of Lockwood, 2 Connoly, 118; Matter of Kahn, 1 id. 510, were cases where wills were set aside on the theory that delusions affected their execution.

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The authorities referred to by counsel for proponents have been carefully examined, and no doubt the proper conclusions are therein drawn from the facts presented. There is no precise rule, however, which can govern all cases where testamentary capacity is involved. Each case must be determined by its own facts. Here the testator willed from his wife substantially his entire estate. She had no means of her own, which he well knew. She was dependent upon his bounty. It cannot be argued from the evidence herein with any reason that he should give practically his estate to charitable institutions, relatives and friends and bequeath to his wife for her support and maintenance the income upon $1,000 a year, a sum grossly inadequate to supply her with the necessaries of life, unless his delusion controlled him when he executed the instrument in question. The false statements he uttered and circulated, the shameful epithets he applied to her, and the beliefs he entertained were the result of the delusion which possessed his mind, directed his testamentary act, and conceived the testamentary provisions which deprived her of the bounty which rightfully belonged to her.

Taking the evidence in its entirety no other conclusion in my judgment should be reached.

A decree denying probate should, therefore, be entered.

Probate denied.

Matter of the Accounting of NATHAN A. DOWNS and WILLIAM H. WELLS, as Executors of the Will of DANIEL GRIFFING, Deceased.

(Surrogate's Court, Suffolk County, January, 1903.)

Interest — When the estate of a testator and his legatees stand to each other as creditor and debtors — Executor's right of retainer — Loans of estate moneys made by an executor to himself as an individual.

The third clause of the will of a testator gave his residuary estate to his children and grandchildren. The fourth clause directed that, if within ten years of his death, any of them died without issue living then the survivors should take the share or shares. The fifth clause directed that "all moneys with interest due me at my decease" from

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the (his) residuary legatees should be included as a part of his personalty, whether or not the debt were outlawed, and that each and every debt which the said legatees "may owe me at my decease with interest shall be treated and reckoned in as so much had and received on account of the provision I have made herein for them and each of them".

Held, that a grandson who had lived for more than ten years after the death of the testator and, who at the latter's death owed him money secured by notes, must pay thereon simple interest from the dates of the notes to that of the testator's death, and that the executors, in settling with the grandson, might retain and set off against his share so much of the principal and simple interest as remained unpaid at the time of the settlement.

An executor of an estate, who borrows its moneys and repays them, is chargeable on the loans with five, and not with six, per cent. interest.

OBJECTIONS to executors' account. Interests determined.

George F. Stackpole, for executors.

Augustus M. Price, for contestant.

PETTY, S. The provisions of the will relevant to this inquiry, are as follows:

"*Third.* I give, devise and bequeath all the rest and residue of my property both real and personal to my children and certain grandchildren herein named as follows, viz: To my daughters Huldah Williamson, Caroline M. Wells, Georgiana Downs and Martha J. Parsons and my Grandson Willis Reeve, each, one equal undivided two thirteenth parts thereof, and to my Grandsons Addison H. Griffing and Gilbert B. Griffing and my Granddaughter Lilian A. Jackson, each, one equal undivided thirteenth part thereof to them and each of them and to their heirs forever, except as hereinafter provided.

"*Fourth.* In case any of my children or Grandchildren mentioned in the Third clause herein, die before the expiration of ten years after my death without issue living, I direct that the share of such child or Grandchild, be distributed among the remaining children and Grandchildren as devised and bequeathed in the third clause herein.

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"*Fifth.* I order and direct that all money with interest due me at my decease from my children and Grandchildren also due me from the Husband of my daughter Martha J. Parsons, be added in and included as a part of my personal property whether any of the debts are outlawed or not and that each and every debt of my children and Grandchildren, which they or any of them may owe me at my decease with interest shall be treated and reckoned in as so much had and received on account of the provision I have made herein for them and each of them and I also direct that the debt due me from the Husband of my daughter Martha J. Parsons, shall be inventoried as part of my personal property and treated & considered as so much had & received by my daughter Martha J. Parsons on account of my provision for her herein."

At the decease of the testator the principal of and certain interest on two notes given him by the contestant for money loaned were due and unpaid. At the expiration of the ten years' limitation the executors made distribution to the legatees, charging against the share of the contestant, a grandson, the principal of these notes and interest to the date of the distribution. It is the contention of the contestant that no interest should be charged to him on these notes subsequent to the testator's death, but that the principal of the notes with the interest accrued to that time alone should be deducted from his share, as received by him then, on account of his interest in the estate. Whether this be the correct view or not depends solely upon the intention of the testator and in determining this I am limited to the language of the will, which, in this respect, is unfortunately obscure.

It is first to be observed that the words "at my decease," occurring twice in clause fifth are without significance. They express what is true as a matter of law, namely, that debts due a decedent mean due at his death, but so far as aiding in the interpretation of the instrument they neither add nor take away.

It is to be further observed that whatever rule of construction be adopted it must be one which will meet and harmonize with all parts of the will and with all the possibilities which may have arisen thereunder. At the death of testator there was no certainty that the contestant would ever be entitled to a share in the estate. He was not an ordinary legatee but was required by the deceased to survive him for ten years, or, dying within that period, to leave issue surviving in order to qualify himself as a beneficiary. He

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had, undoubtedly, at the death of the testator an interest, but it was not one which entitled him to the payment of money of the estate until the terms imposed had been met and satisfied. Being entitled to no share at testator's death no payment on account thereof could be made at that time. If the executors could not at that time advance to him in cash on account of his interest they could not accomplish the same end by canceling an indebtedness then existing from him to the testator. The words "had and received," as used in the fifth clause, do not warrant a different conclusion, for by express direction he shall not "have and receive" until the ten years expires and, perhaps, not even then.

It appears, furthermore, from a study of the entire will that the idea uppermost in the testator's mind was equality: Why he made of his legatees two classes is immaterial. It remains that the members of each class must share and share alike. This cannot be accomplished unless the interest on the debts of the legatees continues until those debts are actually paid. The estate began at less than $5,000 personalty. It has increased to nearly $20,000, mainly from accumulations of income. In this increase, as in the principal, the contestant shares to the extent of his one-thirteenth. So do others of his class, but unless his obligations bear interest he receives a decided advance over them, namely, the entire income for ten years on his indebtedness instead of one-thirteenth only. It was the express wish of the testator that no such disparity should exist, and the equitable right of retainer applies as to both principal and interest. A similar view was that expressed in Matter of Foster, 38 Misc. Rep. 347; 77 N. Y. Supp. 922.

The estate is in fact for all intents and purposes the same as if the testator had himself lived during the ten-year limitation, and at the end thereof divided his estate into thirteenths to take effect at once and despite the lapse of time either before or after the testator's death the equitable rule requires that the executors shall deduct from the share paid the legatee his indebtedness, both principal and interest. Rogers v. Murdock, 45 Hun, 30; 9 N. Y. St. Repr. 660.

That this rule would have been adopted in Matter of Robert, 111 N. Y. 372, had not the testator expressly negatived the question of interest is strongly intimated in that case. At page 380 the court says, speaking of a debt due from a beneficiary on which the testator directed no interest to be charged: "In this clause

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we find an added incident of the indebtedness before referred to. It is such as is interest bearing, either by its own terms or by operation of law consequent upon its being due and payable, and the object of the provision is to interfere with and modify the legal rules which would attach interest to the debt due or to become due."

That the relations of testator and contestant were those of the ordinary creditor and debtor is established by the decision in Ritch v. Hawxhurst, 114 N. Y. 512. In this case the provisions of the will, save for the ten-year limitation, were the same in substance as those of the will under discussion. It was clearly held that no gift or advancement was intended; that the transaction remained as it was at the beginning, a simple debt, and the judgment entered therein, to be consistent with the opinion, must have included interest.

In Verplanck v. De Went, 10 Hun, 611, the will directed the sum of $5,000 paid the legatee by testator during life "to go in diminution" of his share in the estate. Interest on this amount was charged to the date of settlement, the court saying: "It stands upon the same footing as any other debt due the estate; the time the debt is due being fixed as the day the will takes effect, its collection being deferred to the date of distribution of the legatee's share. It forms a portion of the assets of the estate, and the legatee receiving his share of it upon the distribution of his share."

In Adair v. Brimmer, 74 N. Y. 539, as in the case in issue, a legatee was indebted to the testator at the death of the latter. At page 560 the court says: "This indebtedness is to be taken into account however as reducing or satisfying the amount which he was entitled to draw as his distributive share of the principal and income of the estate and which amounted on the 31st of December, 1871 — the date to which the accounts were made up — to about $85,000, on the basis of the account as settled. Interest being chargeable to him on his indebtedness, from the date of the death of the testator." Again at page 566: "For the indebtedness of Charles, existing at the time of the departure of Mr. Brimmer for Europe in August, 1867, or so much of it as is in excess of the amount payable to Charles at the time of the accounting less the portion of indebtedness which existed at the death of the testator, Mr. Brimmer should be held responsible with the other

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executors, and the amount due by Charles at the testator's death, with the interest thereon, should be first applied to the extinguishment of his distributive share of the estate."

Upon principle and authority, therefore, interest on the indebtedness of all legatees is properly chargeable to the date of settlement. Simple interest alone, however, should be charged. The executors have in good faith and in an honest interpretation of the will added to the principal of the contestant's notes the interest due thereon at testator's death and on the sum so found have computed interest to the settlement. With this I do not agree. The contestant while having a debtor's liabilities is also entitled to a debtor's privileges. The computation as made amounts to compound interest. This would be as unjust to the contestant as it would have been to others, strangers, whose notes the testator held at his death and who paid simple interest thereon for some time thereafter. Nothing in the will requires interest on interest. Being an ordinary debt the every-day rules of interest apply. The proper method is to compute interest on the notes from their dates to the date of settlement at the expiration of the ten years, deducting from the sum so found all payments of interest made.

The objection that the managing executor should be charged with six per cent. interest on the loans made to himself is not sustained. There is no hard and fast rule fixing the liability of executors for interest. The rate is to be determined from an examination of all the circumstances in each case, the most important of which is good or bad faith, as the case may be. The executor has, in good faith, loaned to himself various sums and given therefor in each case a note payable to the estate with interest at five per cent. Principal and interest have been fully paid. The notes have been kept with and as part of the assets of the estate and marked "paid" at the proper time. The entire estate has been ably managed. Exclusive of the proceeds from realty the estate has about doubled in ten years. At no time has there been a loss. A large part of the income is that paid by the executor on the notes. Upon principle he is rather to be commended than censured. The difficulty in obtaining investments should not be lost sight of. A safe investment at six per cent. is as rare as it is desirable. Safety and good income are strangers. The executor has paid the going rate and the legatees have benefited by

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one per cent. over and above the income from the savings bank accounts to which there is no objection. Had the executor loaned to his neighbor on similar notes with the same successful outcome, no objection could have been made. That such a loan, in event of loss, would render him personally liable for principal and interest at the legal rate is immaterial when in fact no loss occurred. Certain trust investments are not illegal in the ordinary use of that term, but illegal in the sense that the investor takes the risk and must make the principal good with legal interest in event of loss. Where he takes the risk, however, and that successfully, he should not be charged a penalty of one per cent. for benefiting the estate by five.

The cases cited in supporting this objection are distinguishable. In King v. Talbot, 40 N. Y. 76, while six per cent. was charged, it was one less than the highest legal rate, and the court observes, at page 95: "Where the failure of a trustee in his duty is wilful, or characterized by bad faith, the highest rate of interest should be imposed. But where good faith and honest mistake concur, the rate of interest rests in a discretion, that permits the consideration of all the circumstances, which show that substantial justice can be done to the *cestui que trust,* by allowing a less rate." In Matter of Myers, 131 N. Y. 416, the assets of the deceased were actually appropriated to the use of the executors individually. Here was an actual *devastavit.* A speculative business was carried on by them with the testator's capital. Not the slightest attempt was made to invest the estate for the beneficiaries. As in the Matter of Thorp, 31 Misc. Rep. 581, the assets of the decedent had lost their identity as estate funds and became individual capital. In Matter of Hall, 164 N. Y. 196, the funds were invested in a manufacturing corporation which failed and most of the investment was lost. The executor was charged with principal and legal interest. Such could not have been the decision had the corporation prospered and he accounted at the proper time for the principal with five per cent. dividends in cash. In Matter of Wotton, 59 App. Div. 584, a similar loss occurred. In Baker v. Disbrow, 18 Hun, 29, there was an entire loss of principal and a partial loss of income. In Adair v. Brimmer, 74 N. Y. 539, no income was derived and there was a loss of principal.

The following cases will be found to support the rule declared: Price v. Holman, 135 N. Y. 124; Wilmerding v. McKesson, 103

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id. 329; Collyer v. Collyer, 6 N. Y. St. Repr. 693; Matter of McKay, 5 Misc. Rep. 123; Shepard v. Patterson, 3 Dem. 183; United States Trust Co. v. Bixby, 2 id. 494; Du Bois v. Brown, 1 id. 317.

Valuable assistance having been rendered the court by counsel, costs will be awarded to both sides.

Decreed accordingly.

JOHN E. JACQUEMIN, Appellant, *v.* JOHN C. FINNEGAN, Respondent.

(County Court, Oneida County, January, 1903.)

Deed — Boundary — Title to "superincumbent materials" in a street.

An owner of a lot bounded on the south by the north "side" of a street does not own the fee of that street to its center.

Where a city paves and curbs the street and assesses the expense *pro rata* on the owner of the lot and thereafter repaves the street by a contractor and digs up the old curbing, it, if useful to the repaving, would not belong to the owner of the lot as "superincumbent materials" placed upon it even if he owned to the center of the street, as the city has a paramount right to use such materials to repave the street, and, besides, the owner of the lot neither owned the curbing nor put it in the street.

APPEAL from a judgment rendered in justice's court of the city of Utica, in an action in which the plaintiff claims the defendant has appropriated and converted certain curbing stone, which the plaintiff alleges is his property.

The facts sufficiently appear in the opinion.

P. H. Fitzgerald, for appellant.

G. C. Morehouse, for respondent.

SMITH, J. E., J. On February 16, 1881, the plaintiff, by a conveyance to him, became the owner of a lot on the north side of Bleecker street, in the city of Utica, in his deed bounded as fol-

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lows: "Commencing at a point on the northerly side of Bleecker street, ten feet west of the east line of lot No. 22, in block 19, as the same is designated on a map made by Charles C. Broadhead, surveyor, in the year 1810, for the representative of Rutger Bleecker, deceased, which map is on file in the clerk's office of said county, and running thence at right angles with Bleecker Street northerly 120 feet to the southerly line of said lot 22; thence at right angles with said last mentioned line 40 feet to the northwesterly corner of a lot of land sold by Horatio Seymour to Cornelius Desmond; thence southerly along said Desmond's westerly line to the northerly side of Bleecker Street; thence westerly along the northerly side of Bleecker Street to the place of beginning. Said lot being forty feet front and rear and 120 feet deep."

This lot is numbered "667 Bleecker Street." The plaintiff was in possession of these premises on July 9, 1902, and from the evidence it appears that he had been in such possession since the date of the deed to him.

In 1882 Fowler & Baxter paved the street, under a contract with the city of Utica. The plaintiff had no contract with any one for that paving, and he paid no contractor for such paving, but he paid an assessment made by the city therefor in proportion to his frontage on the street. The plaintiff claims he paid for such paving, but testified that he means he paid an assessment for the pavement, gutters and curbing made in 1882.

The street is now being repaved under a contract made by the city with "The Barber Asphalt Company."

On the argument the parties stipulated that the determination to pave the street in question in front of the plaintiff's premises was duly published in two official newspapers, as required by the city charter. Also that the common council duly advertised for bids to pave the street in front of the plaintiff's premises, in two official papers, as required by the charter. The parties also stipulated to waive the question of title to real estate being in dispute.

The proceedings under which the contract to repave the street was let, and the paving is being done, seem to be in accordance with the city charter. The specifications under which the work is being done require the contractors to remove the curbing stone in question in order to lay the proper foundation, and properly do the paving they have contracted to do.

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The defendant was in the employ of the contractors, and, under the order of the city engineer, the contractors had caused the curbing in question in front of the plaintiff's premises to be taken up; it was piled up in the street, preparatory to doing the paving under their contract. The plaintiff caused the curbing stone thus taken up and piled in the street to be conveyed on to his lot. The defendant, on July 9, 1902, caused them to be removed from the plaintiff's lot, contrary to the objections of the plaintiff's wife, acting as his agent. This action was then brought. The stone in question had been used as curbing in the street ever since the street was paved in 1882.

Various errors were committed by the justice in receiving and excluding evidence, but from the conclusion I have reached I do not deem it necessary to consider such errors.

I have reached the conclusion that this action cannot be maintained, for two reasons.

First. The plaintiff was never the owner of the stone in question; he did not put them in the street. The city of Utica did. What the plaintiff paid was by way of tax presumably levied in pursuance to law, to pay, with others for the improvements to the street. Such improvements were made for the use and benefit of the public, including the plaintiff, and, under the law, the plaintiff, as an adjacent property-owner, was obliged to bear such part of the burden as the law imposed, but that did not give him the title to any part of the improvement made.

If a town should find it necessary, as often is the case, to build a bridge or culvert in the highway or street, and such bridge or culvert is built pursuant to law, the taxpayers paying therefor, would the taxpayers thereby become the owner of the bridge or culvert? Clearly not.

The street in question is under the control of the city of Utica, whose duty it is, at all times, to keep the street in a safe condition. To do this the city is clothed with the authority to cause needful repairs to be made and the law fixes the liability on the property-owners to pay for such repairs.

Section 99 of the city charter confers upon the common council the power to cause any street, highway, lane or alley in said city, to be graded, leveled, paved or repaved, which is to be done by contract made therefor. It is held that the power to pave includes curbs, sidewalks, gutters, trimmings and grading therefor. Elliott

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Roads and Street, § 461; Wilson v. City of Watertown, 3 Hun, 508; 2 Dillon Mun. Corp., § 780, n. 1. And the city may do all of these acts in one contract. L. S. R. R. v. City, 5 Munic. Corp. Cases, 229.

The plaintiff claims title to the curbing not only because he was taxed to put it down, but also because it was located on land which he says he owned in fee. In other words, because it is "superincumbent material," located on his land, the same as soil, gravel, stone, etc., found or located on his land, is part of the land.

But it is held that the municipality has the right to reasonably use or appropriate soil, or superincumbent materials while making repairs on or improving the highway. Bundy v. Catto, 61 Ill. App. 209; Overman v. May, 35 Iowa, 89; Cook v. Hecht, 64 Mo. App. 273; Fetch v. Gilman, 22 Vt. 38; Baxter v. Winwooski Turnpike Co., 22 id. 114.

According to some of the cases, soil may be taken from one part of the highway and used upon another part. Bissell v. Collins, 28 Mich. 277. Or even upon a different highway, which is within the jurisdiction of the same municipal authorities, both highways being regarded as parts of one plan of public improvement. City of New Haven v. Sargent, 38 Conn. 50; Town of Palatine v. Kreuger, 121 Ill. 72; Hovey v. Mayo, 43 Maine, 322; Adams v. Emerson, 6 Pick. 58; Denniston v. Clark, 125 Mass. 216; Griswold v. Bay City, 35 Mich. 452; Huston v. City of Fort Atkinson, 56 Wisc. 350.

It has been decided that the right of the public to the soil for the purpose of repairs or improvements is paramount to the claim of the owner of the fee, and accordingly he has been restrained by injunction from taking possession of earth which has been removed in repairing the highway. City of New Haven v. Sargent, 38 Conn. 50.

And so it has been held that he may be restrained by ordinance from removing surplus soil needed elsewhere for the streets. Town of Palatine v. Kreuger, 121 Ill. 72.

In Robert v. Sadler, 104 N. Y. 229, a full review of the cases in this State on the subject is made, and the result of the court's consideration of the question is fairly stated in the headnote, as follows: "Where the public have taken an easement for a street or highway, and the surface of the land is above the grade of the highway, so that, in order to reach the grade line, it is necessary

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to remove the superincumbent material, this may be used on other portions of the road, on the premises of other land owners; but the public easement justifies only the taking of earth and soil which the process of construction or repair requires, and necessarily compels to be removed."

In Cotanch v. Grover, 57 Hun, 279, Hardin, P. J., says: "If the removal of the earth in front of the plaintiff's premises was made for the purpose of improving the street or highway by the village authorities, and for no other purpose, and they acted in good faith in such removal with a view to benefit the public, their action was within their corporate powers."

In view of these and other authorities, I think it well settled that, even had the plaintiff been the owner of the land to the center of the street, his title and interest would be subordinate to the rights of the city. The city would then have the right as against the plaintiff, to utilize in good faith, any of the "superincumbent material" needful for repairing the street.

New curbing is now being put in along the street, and it cannot be said that the old material may not be needed in the improvements now being made. Indeed, the defendant attempted to show that the stone in question was to be used in repaving the street, but was not permitted by the court below to do so. The defendant ought to have been permitted to show by proper proof that the stone in question was needed in making the present improvements and was to be used therefor. The defendant had charge of the work, and knew for what purpose the stone was to be used.

To hold that the plaintiff could recover is equivalent to holding that the plaintiff had the right, as against the city, to appropriate the stone in question; that his title was paramount to the rights of the city, and if he had been permitted to hold the stone, if permitted to remove it, then the city would be deprived of its use, notwithstanding it might be needful in making the improvements.

The curbing was lawfully taken up, by order of the city engineer, and piled in the street. It was in the possession of the city, when the plaintiff took it into his possession. The defendant caused it to be taken back to the street, and if he is guilty of conversion, it is as against the city, and not as against the plaintiff.

Second. The plaintiff is not the owner of the land where the curbing in question laid; his lands are bounded on the south by

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the northerly side of the street; by the deed, the lot conveyed to him is 40 feet front and rear and 120 feet deep.

The witness Rich measured the lot, and found that measuring from the north line of the street the lot was 120 feet deep, and it was 40 feet wide along the side of the street. This undisputed evidence shows the plaintiff has all the land called for by his deed located north of the street, as in the deed described.

From the north line of the street to the center thereof is thirty-three feet, and I can see no way by which the deed can be construed to include the street or any part of it.

In Kings County Fire Ins. Co. v. Stevens, 87 N. Y. 287, the lands were described in the deed as "Beginning at a point on the southerly side of the Wallabout bridge road, and running thence southerly; and after various courses and distances north 48 degrees 9 minutes west, * * * to the Wallabout bridge road, and from thence along said road * * * to the place of beginning." It was held that the grant did not include the highway to the center; but that the land was bounded by the southerly side of the highway.

It was settled in this State, Child v. Starr, 4 Hill, 369, that a boundary in a deed "along the shore" of a fresh-water river carried the grantee only to low-water mark, and that the bed of the river did not pass under the conveyance.

So a boundary by the bank of a creek has been held to confine the grantee to the margin of the stream. Halsey v. McCormick, 13 N. Y. 296.

I think the roadbed was excluded by the terms of the description within the cases of Jackson v. Hathaway, 15 Johns. 447; English v. Brennan, 60 N. Y. 609; White's Bank of Buffalo v. Nichols, 64 id. 65; Blackman v. Riley, 138 id. 318–324; Holloway v. Southmayd, 139 id. 390–412; Deering v. Reilly, 167 id. 184–193.

The plaintiff not having acquired the title to, or being the owner of, the stone in question, and not being the owner of the land where it lay, he cannot recover in this action.

The judgment is, therefore, affirmed, with costs to the defendant.

Judgment affirmed, with costs to defendant.

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WILLIAM CARPENTER, Plaintiff, *v.* MARY E. MERGERT, Defendant.

(Supreme Court, Kings Special Term, January, 1903.)

Pleading — Denials must be separated from defences.

Denials must be stated before and apart from affirmative allegations of an answer to the end that, if the denials are frivolous, the plaintiff may move for judgment on them, or that, if the affirmative allegations are immaterial or irrelevant, the plaintiff may move to strike them out, or demur to them in case they are insufficient as a defence.

MOTION to require the defendant to amend her answer by separating the denials from the affirmative allegations therein, and allege them separately.

Arthur H. Yetman for plaintiff.

Sixt Carl Kapff for defendant.

GAYNOR, J.: In order to separate the denials from other matter it is necessary to determine what a denial is. I had supposed that to be a plain matter about which there could be no difference of opinion now, any more than there has ever been from the beginning. But in the recent case of *Soper* v. *St. Regis Paper Co.* (76 App. Div. 409), the opinion contains the following:

"The rule is well settled that a material fact alleged is not controverted or put in issue by a statement inconsistent with the facts, or from which a denial may be implied or inferred (Rodgers v. Clement, 162 N. Y. 428; Smith v. Coe, 170 *id.* 167). The only exception to this rule, if it may be properly called an exception, is where the specific facts stated in a pleading are such as to necessarily controvert the allegations of the adverse party. *For instance, if a complaint should allege that a certain sum of money was due from the defendant, and the defendant, in answering, should allege that the amount had been paid, this, though not in common acceptation of the word a denial, would, in law,*

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be a denial; it would raise an issue, and this is what the law contemplates in pleadings."

Heretofore the defence of payment has never been thought of as a denial of the allegations of the complaint. If a complaint be for goods sold and delivered, or on a promissory note, or the like, and the answer is a plea of payment, the allegations of the complaint are not put in issue at all. The defence of payment is not a denial of them. On the contrary, it is a "confession" of the truth of the complaint, but an "avoidance" thereof by a plea of payment as a defence. Instead of such a defence being a denial of the complaint, and putting it in issue, the plaintiff has nothing to prove, and the affirmative is with the defendant at the opening of the trial. This is so common in the experience of trial judges and trial lawyers that it does not need to be more than mentioned.

The motion is also embarrassed by a statement in the opinion in *Hopkins* v. *Meyer* (76 App. Div. p. 367). Speaking of where denials should be in answers — whether in a separate place, or mixed up with affirmative matter pleaded as a defence — the learned judge says:

"It is nowhere provided where such denials shall be made, whether in separate paragraphs or in connection with other matters."

It cannot be overlooked or disregarded, however, it seems to me, that section 500 of the Code of Civil Procedure provides by specific enumeration that an answer shall consist, first, of "A general or specific denial of each material allegation of the complaint controverted by the defendant", and, second, of "A statement of any new matter constituting a defence or counterclaim"; matter in "defence" being of course matter which cannot be proved under a denial — matter which, taking all of the allegations of the complaint to be true, is nevertheless a "defence" to the action.

In addition to this precise separation of denials from affirmative matter, section 507 requires that defences of new matter be "separately stated". Certainly this does not permit denials to be mixed up in the matter stated as a defence.

An answer can properly consist only (1) of a denial or denials of the allegations of the complaint (which is the way to raise an issue on the complaint), and (2) of any new matter constituting

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a "defence"; and these two parts of the answer have to be separated, and separately stated. And, as is just as well known, an allegation of the complaint is not denied by affirmative allegations in the answer which are inconsistent with it. Such affirmative allegations cannot be taken in lieu of denials. The court was not called upon to decide, and did not decide, the contrary of these propositions in the two cases from the opinions of which I have quoted. It does not seem, therefore, that I should feel bound by the expressions of opinion of the learned judge who wrote therein.

I must therefore hold that the formal denials in this answer must be stated separate and apart from any and all affirmative allegations; and that the affirmative allegations be next separately stated; to the end that if the denials be in form frivolous, a motion for judgment thereon may be made, or that if the affirmative allegations be immaterial or irrelevant, a motion may be made to strike them out, or that if they be insufficient as a defence, they may be demurred to, as the plaintiff may be advised.

The motion is granted, with $10 costs.

Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate No. 4,171, Issued to AGNES McCUE.

(Supreme Court, Kings Special Term, January, 1903.)

Liquor Tax Law — Illegal sales by a bartender.

It is not a defense, to a proceeding to revoke a liquor tax certificate on the ground of illegal sales, for the holder to allege that her bartender made the sales contrary to her express injunction and this because the Liquor Tax Law makes her liable for all violations of it committed by her bartender.

APPLICATION for an order to revoke and cancel a liquor tax certificate.

H. H. Kellogg, for petition.

James & Thomas H. Troy, for certificate holder.

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MAREAN, J. The defendant left a bartender in charge of the barroom. He made sales in violation of law. I think it no answer that he did so contrary to her express injunction. Such an injunction, if not express, is always implied, so the case does not differ in principle from thousands in which certificates have been revoked. The certificate holder must see to it that violations are not committed by his bartender or other agent. Liquor Tax Law, L. 1896, ch. 112, § 28, as am'd L. 1901, ch. 640.

However drastic the remedy there provided may be, it was within the power of the Legislature, and the language of the statute is too plain to be evaded on any pretext. The provision in question was necessary to make the law effective since it would be very difficult in any case to show that the barkeeper acted with actual authority or approval of the certificate holder.

The certificate is revoked.

Certificate revoked.

ELIZABETH GALLAGHER, an Infant, by MICHAEL GALLAGHER, Guardian *ad Litem*, Plaintiff, *v.* THE GENEVA, WATERLOO, SENECA FALLS & CAYUGA LAKE TRACTION CO., Defendant.

(Supreme Court, Monroe Special Term, January, 1903.)

Costs — Infant suing as a poor person.

An infant, not being of ability to sue, who alleges that she has a cause of action against the defendant, may be permitted by an order of the court to prosecute as a poor person and the mere fact that her father and guardian *ad litem* is a responsible person affords no reason why the court should vacate the said order and require her to give security for costs.

MOTION to vacate an *ex parte* order permitting an infant plaintiff to prosecute this action as a poor person.

Charles A. Hawley, for motion.

W. Smith O'Brien, opposed.

DAVY, J. This is a motion to vacate an *ex parte* order permitting the infant plaintiff to prosecute this action as a poor person

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and for an order requiring security for costs to be given by the plaintiff pursuant to section 3268 of the Code of Civil Procedure.

The defendant contends that because the guardian *ad litem* is the father of the plaintiff and is a responsible person to act as guardian, the plaintiff should not be permitted to prosecute as a poor person.

I am inclined to think that the mere fact that the father is able to give security for costs has nothing to do with the rights of the infant plaintiff. She sets forth in her complaint a good cause of action and if she is successful the recovery inures to her benefit and not to the father, who, for that reason alone might refuse to give security for costs and thereby deprive the infant of the right to prosecute her action for damages.

It is the poverty of the infant plaintiff and not of the guardian *ad litem* that confers jurisdiction upon the court to permit her to prosecute the action as a poor person.

The law contemplates that all persons who are residents of this State shall have access to the courts for the trial of actions without being required to give security for costs.

The court has power, even when an appeal is taken by a person acting in another's right, to dispense with security for costs.

It seems to me that the order dispensing with security for costs was a proper exercise of discretion by the learned justice who granted it.

The motion, therefore, is denied, with $10 costs.

Motion denied, with $10 costs.

JED E. ADAMS, Plaintiff, *v.* HENRY SLINGERLAND, Impleaded, Etc., Defendant.

(Supreme Court, New York Special Term, January, 1903.)

Statute of Limitations — Action against a stockholder of a full liability corporation created under the Business Corporations Law — Misjoinder of defendants.

An action against a stockholder of a full liability corporation created under the Business Corporations Law (L. 1890, ch. 567, § 6) does not fall within the limitation of two years as prescribed by the Stock Corporation Law (L. 1890, ch. 564, § 55).

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The joinder of an excessive number of defendants is not a defense to a cause of action properly pleaded as to an answering defendant nor would it be to him a ground of demurrer.

Issues of law upon demurrer to separate defenses.

Edward S. Clinch, for plaintiff and demurrer.

Louis F. Reed, for defendant Slingerland, opposed.

Bischoff, J. The question presented is whether an action against a stockholder of a full liability corporation created under section 6 of the Business Corporations Law (L. 1890, ch. 567), falls within the statutory limitation of two years, as prescribed by section 55 of the Stock Corporation Law (L. 1890, ch. 564). By the force of section 33 of the General Corporation Law (L. 1890, ch. 563, provisions of the Stock and Business Corporations Laws not in conflict, and which relate to the same matter, may be read together, but any conflict in the provisions of the Stock Corporation Law and the Business Corporations Law must be resolved in favor of the controlling effect of the latter; therefore, unless these sections (Stock Corp. Law, § 55; Bus. Corp. Law, § 6) cover the same subject and the two years' limitation may be read in harmony with the spirit of section 6 of the Business Corporations Law, that limitation cannot apply to this action.

It is apparent that section 55 of the Stock Corporation Law is, in part at least, in conflict with section 6 of the Business Corporations Law, for the former deals with a liability which depends upon a preliminary action against the corporation, while in the latter the stockholder is liable for the debt, and the necessity of an action against the corporation relates not to the right of action against the stockholder but merely to the enforcement of judgment against him by execution.

The action against the corporation, under section 6 of the Business Corporations Law, need not be brought to judgment before the stockholder may be sued — the statute merely suspends the creditor's right to execution against the stockholder until execution has issued and has been returned unsatisfied as against the corporation (Walton v. Coe, 110 N. Y. 109), whereas, under section 55 of the Stock Corporation Law, a judgment must be obtained

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against the corporation before any right of action accrues against the stockholder. It is an action against the corporation — an incident to this limited liability — which section 55 declares must be brought within two years and, so far, the section deals with a subject distinct from the subject treated of by section 6 of the Business Corporations Law. The omission of the two years' limitation from section 6 does not actually result in a conflict between this section and section 55, because the sections do not relate to the same matter, and there is no warrant for applying the limitation of section 55 to the different subject covered by section 6. So far as the earlier sources of this provision for the two years' limitation are of importance, it may be noted that section 6 of the Business Corporations Law as it now stands was in force in the year 1900, and, therefore, its effect as an independent provision, without resort to the provisions of the Stock Corporation Law, is preserved by section 36 of the General Corporation Law. I conclude that the limitation set up by the defense demurred to is not applicable to this action.

Another defense demurred to proceeds upon the allegation that there is a misjoinder of parties-defendant, in that the plaintiff has joined more than one defendant on an alleged several liability.

The joinder of an excessive number of defendants is not a defense to the cause of action properly pleaded as to an answering defendant. It would not be a ground of demurrer (Richtmyer v. Richtmyer, 50 Barb. 55), and while the attempt to sue a number of parties severally liable, in a cause not falling within section 454 of the Code, might be attacked by demurrer for improper joinder of causes of action (Code, § 488, subd. 7), the allegations of this attempted defense afford no ground upon which a judgment of the plaintiff may be resisted.

Demurrer sustained, with costs.

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Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate No. 5,888, Issued to OTTO KUCH.

(Supreme Court, New York Special Term, January, 1903.)

Liquor Tax Law — Consent of the holder of a certificate to its use by another — Revocation.

Where violations of the Liquor Tax Law occur in a place ostensibly conducted under an outstanding liquor tax certificate and the person in charge is using it with the consent of the holder thereof, the statute holds the latter responsible for the violations and for the costs imposed upon a revocation of the certificate.

Semble, that so long as the certificate remains in the name of the holder he will be liable for violations occurring in the place, whether or not he has consented to the use there of his certificate.

APPLICATION for an order revoking and cancelling a liquor tax certificate.

William E. Schenck, for petitioner.

Alfred R. Page, for Otto Kuch.

BISCHOFF, J. There is no question that the violations of the Liquor Tax Law were permitted at the place designated for the sale of liquors in this certificate, and it appears that the business was conducted ostensibly under such certificate. The contention of the respondent is, however, that the business was not his business, nor was he connected in any way with the violations. This may be the fact, but still he cannot resist the cancellation of the certificate for the violations proven, nor escape the incidental liability for costs. As the holder of the certificate "he is the principal whom the law will look to during the conduct of the business, and will hold responsible for compliance with the statutory provisions." Lyman v. Kurtz, 166 N. Y. 274. The evidence supports the inference of his consent to the use of this certificate by the person in charge of the place, and, indeed, the statute appears to contemplate the responsibility of the holder irrespective

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of an actual consent while the certificate remains in his name, but in the possession of another at the place designated for traffic in liquors.

The proceeding to cancel the certificate is maintainable against the holder of record where any provision of the Liquor Tax Law is violated "at the place designated in said certificate as the place where such traffic is to be carried on by the holder of said certificate, or by his agent, servant, bartender, or any person whomsoever in charge of said premises." Liquor Tax Law, L. 1896, ch. 112, § 28, as amd. L. 1901, ch. 640. The words "any person whomsoever" cannot be taken as restricted to the sense of an agent or servant, for this would render them meaningless, in view of the context, and the statute is to be reasonably construed for the purpose of giving effect to all the words employed (Matter of New York & Brooklyn Bridge, 72 N. Y. 527), there being no ambiguity in the words, and such as would call for resort to the doctrine *noscitur a sociis*. (See Black Interp. Laws, 135.)

The respondent could readily have protected himself against the necessity of responding to such a proceeding as this by causing the certificate to be transferred under section 27, if it be the fact that he had parted with his interest, but upon the case as it stands, my conclusion is that the petitioner is entitled to an order of cancellation, with costs of the proceeding.

Application granted.

SARAH ADLER and PAULINE EDELSTEIN, Plaintiffs, *v.* WILLIAM KRAMER, JR., ALBERT J. KRAMER, JOSEPH W. BAUMANN and CONRAD WEBER, Executors, Etc., of WILLIAM KRAMER, Deceased, Defendants.

(Supreme Court, New York Trial Term, January, 1903.)

Lease — Rent collectible up to the issue of a warrant of dispossession — Test of liquidated damages.

The issue of a warrant in summary proceedings cancels the lease but does not preclude the landlords from holding the tenants for rent of the premises up to the time when the warrant was issued.

Where a theatre lease, involving a yearly rent of $22,500 and permitting a renewal, expressly provides for a tenants' deposit of

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$5,000, and for its forfeiture, upon a tenants' breach, and describes it as the sum agreed upon "as liquidated damages that the said party of the first part (the landlords) is entitled to have and receive without set-off or counterclaim", the landlords are, after duly dispossessing the tenants for a breach, entitled to retain the deposit as liquidated damages, and this because it is clearly designated as such, damages for the breach are not definitely ascertainable, and $5,000 is not an unconscionable measure for the damages sustained by the landlords.

ACTION by tenants under a written lease to recover $5,000 deposited with defendants, the landlords of the demised premises.

Joseph J. Harris, for plaintiffs.

O'Hare & Dinnean, for defendants.

BLANCHARD, J. This action is brought by tenants under a written lease to recover the sum of $5,000 deposited with the defendants, the landlords of the demised premises. The terms of the deposit, as specified in the lease, are as follows: "It is further agreed upon the signing and delivery of these presents, the parties of the second part shall deposit with the party of the first part, the sum of five thousand dollars ($5,000) the same to be received and held by the party of the first part by way of security for the faithful performance of the conditions and covenants of this lease, and privilege of renewal, on the part of the parties of the second part, which said sum of five thousand dollars ($5,000) shall be repaid to the parties of the second part at the end of the demised term thereof, and said privilege of renewal, provided that they have performed all the conditions and covenants of this lease and that in the event of failure on the part of the parties of the second part to perform any or all of the conditions herein contained the said sum shall be forfeited to the party of the first part, as and for damages for such failure, said sum being agreed upon as the liquidated damages that the said party of the first part is entitled to have and receive without set-off or counterclaim." Upon the trial the jury was discharged by consent of counsel, and the plaintiffs reduced their claim to the sum of $2,500, and the plaintiffs' right to the recovery of this amount was submitted to the court as

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a question of law. The only evidence offered was documentary, consisting of the written lease between the parties and the record of the Municipal Court in dispossession proceedings. From the lease it appears that the Thalia Theater, situated at Nos. 46–48 Bowery, in the city of New York, was leased by the defendants to the plaintiffs for the term of one year, commencing July 1, 1896, and ending June 30, 1897, at the rental of $22,500 per year, payable in nine equal installments of $2,500 each on the twenty-second day of each month, the first payment to commence September 22, 1896. From the record of the dispossession proceedings it appears that the plaintiffs failed to pay the installment of rent of $2,500, which became due on January 22, 1897; and because of such default in payment, the proceedings were instituted, which resulted in a warrant being issued on February 23, 1897, awarding the possession of the premises to the landlords, the defendants in this action, and from the return of the marshal it appears that the said warrant was executed on that day. The plaintiffs' claim is founded upon the following argument: (1) that the issuing of the warrant for the removal of the tenant from the demised premises cancels the lease; (2) that the stipulation in the lease as to the deposit being liquidated damages does not necessarily make it such, but (3) that as matter of fact it was in the nature of a penalty, and, hence, after deducting the amount due to the defendants for rent at the time of the issuing of the warrant, to wit, $2,500, the balance is properly recoverable by the plaintiffs, the depositors. Assuming plaintiffs' argument to be well founded, it is not made to appear that they would be entitled to recover anything in this action. The sum of $2,500, being the installment of rent due January 22, 1897, was admittedly due, and by the terms of the lease the next installment, due February 22, 1897, was likewise due before the warrant of dispossession was issued, as this was only issued on February 23, 1897. The law, as laid down in the case of Michaels v. Fishel, 51 App. Div. 274, affd., 169 N. Y. 381, is that although the issuing of the warrant for the removal of a tenant cancels the lease, still the landlord is not precluded thereby from holding the tenant for rent to the time the warrant was issued, at which time it would seem that two installments of rent, or $5,000, was due to defendants, or a sum equal to the amount of the deposit. Disregarding this fact, however, and assuming, as undoubtedly is the law, that the lease was

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cancelled when the warrant was issued, and that it does not necessarily follow that the designation of the deposit as "liquidated damages" in the lease made it such, still, I am of the opinion that in the present case it was liquidated damages, and was not a penalty as plaintiffs contend. Whether the deposit of the $5,000 under the lease was made as liquidated damages or as a penalty is the question to be determined, and I can do no better than refer to the language of Mr. Justice Hatch in the case of Cæsar v. Rubinson, 71 App. Div. 180, 182, where the rule of law is admirably stated: "Where the language is clear and explicit, providing that the sum reserved is to be regarded as liquidated damages, effect will be given to such language unless the damages resulting from the breach are definitely ascertainable and the sum reserved is so great as to be an unconscionable measure for the damage sustained." Citing Curtis v. Van Bergh, 161 N. Y. 47. Applying this principle to the facts of the case here on trial, we find the language of the lease to be "clear and explicit" that the deposit should be regarded as liquidated damages. We find, further, that the damages cannot be definitely ascertained, when we consider the character of the demised premises and the term of the lease, for who could have foretold when the lease was entered into, what loss in the rental of the premises the landlords would suffer in case of default on the part of the tenant before being able to secure another tenant paying as much rent as that provided in the lease? And it is quite evident that the amount of $5,000, the deposit in this case, is not so great as to be "unconscionable." It represented only two installments of rent reserved under the lease and, as we have seen, that amount of loss in the rent had been suffered at the time the plaintiffs were dispossessed. I conclude, therefore, that the deposit in this case was not in the nature of a penalty, but was an entirely proper sum to be reserved as liquidated damages, and that it was so reserved by the parties. Longobardi v. Yuliano, 33 Misc. Rep. 472, 474. It follows that judgment should be for the defendants, and is so rendered under the stipulation.

Judgment for defendants.

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Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate No. 11,129, Issued to THOMAS EUSTACE and transferred to JOHN CAMPBELL.

(Supreme Court, New York Special Term, January, 1903.)

Liquor Tax Law — False statement that a building, to be used as a hotel, complied with the statute.

A statement, of a person desirous of becoming a transferee of a liquor tax certificate and intending to conduct a hotel, made in his application to the effect that the building in which he is to carry on his hotel complied with the statutory requirements in regard to a hotel, is material and irrevocable.

Where the answer of the proposed transferee fails to deny the excise commissioner's allegation that the building did not comply with the statute there is no material issue before the court and it will, without a reference and upon proof of mere formal matters, revoke the certificate.

APPLICATION by the State Commissioner of Excise for an order revoking and cancelling a liquor tax certificate.

H. N. Kellogg, for petitioner.

Guggenheimer, Untermyer & Marshall, for respondent.

BLANCHARD, J. This is an application by the State Commissioner of Excise for an order revoking and cancelling a liquor tax certificate for false statements made by Campbell in his application for a transfer of a license to him. The false statements claimed by the petitioner are in answer to questions 20, 24 and 25. The respondent stated in his answer to these questions that he intended to "carry on a *bona fide* hotel" on the premises, and that such hotel complied with the requisites provided by the statute for hotels. The answer, in effect, denies that any material statement was false. It does not contain any denial of the fact that the building did not comply with the statute. The respondent is bound by the statements in his application as to the nature of the

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license sought, and he cannot now claim it was not for the purpose as stated in the application. Matter of Barnard, 48 App. Div. 423. In this aspect of the case the compliance of the building in which the traffic in liquor was to be conducted with the requisites provided by the statute was material, and the failure of the answer to contain a sufficient denial of the alleged false statements entitles the petitioner to the relief sought. Liquor Tax Law, L. 1896, ch. 112, § 28, as amd. L. 1901, ch. 640, § 5. As no issue is presented except as to matters of formal proof, no reference is necessary. Matter of Auerbach v. Johannsen, 31 Misc. Rep. 44; Matter of Bridge v. Mohrmann, 36 App. Div. 533. The proof on the formal matters may be made to the court before the final order of revocation is made. The application of the petitioner should be granted.

Application granted.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* THE AMERICAN LOAN & TRUST CO., Defendant.

(Supreme Court, New York Special Term, January, 1903.)

Equity — Final distribution of a fund in court — Method — Rights of claimants — Notice of filing referee's report — Relief afforded a claimant in a peculiar situation — Stay.

At any time before final distribution of a fund in the hands of the receiver of an insolvent corporation, the court may, on such terms as may be just, permit a claimant of the fund to come in, be heard and enforce his rights.

Where the Appellate Division has fixed a method for the distribution of the fund the Special Term should follow it.

A creditor who has not appeared either in person or by attorney before a referee appointed to take and state the account of the receiver is not entitled to notice of the filing of the report of the referee.

Where there were preferred and unpreferred claimants of the fund and the referee allowed the former interest from and after the receiver's appointment, and the Appellate Division and the Court of Appeals agreed in reversing this ruling, and the Appellate Division thereafter divided this part of the fund among four unpreferred creditors who had duly filed exceptions to the referee's report, the

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Special Term considered that a fifth unpreferred creditor, who had also duly excepted to the report, had been represented on the appeal from the order confirming it, had moved for a resettlement of the order and for a reargument of the appeal and had been refused by the Appellate Division leave to appeal to the Court of Appeals, had suffered an injustice in being excluded from sharing in the fund, and therefore the Special Term, while making a final order distributing the fund in accordance with the decision of the Appellate Division, granted a stay, pending an appeal from the final order, upon condition that security for interest and costs be given the said four unpreferred creditors.

APPLICATION for a final order of distribution of the balance remaining in the hands of the receiver appointed in an action dissolving defendant corporation as found by the report of a referee taking and stating the receiver's account, and which balance pursuant to the terms of an order of this court previously made herein, confirming the report of said referee, is retained by said receiver.

Edward S. Hatch, for Thomas P. Wickes, receiver of Coffin & Stanton.

C. H. & J. A. Young, for estate of Darius Seacord.

O. P. Metcalf, for Manufacturers & Traders' Bank of Buffalo and others.

Clarence E. Thornall, for Edward F. Browning, etc., and others.

Opdyke, Willcox & Bristow, for J. Edward Simmons as receiver of The American Loan & Trust Co.

James Dunne (Charles W. Dayton, of counsel), for Louise B. O'Connor, etc.

Barclay E. V. McCarty, for Euphemia A. Hawkes, executrix.

Ritch, Woodford, Bovee & Wallace, for Union Dime Savings Institution.

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Parsons, Closson & McIlvaine, for Thomas G. Ritch and others, executors, etc., of the late Daniel B. Fayerweather, deceased.

FITZGERALD, J. This is an application for a final order of distribution of the balance remaining in the hands of the receiver appointed in an action dissolving the defendant corporation, as found by the report of a referee taking and stating the receiver's account, and which balance, pursuant to the terms of an order of this court previously made herein, confirming the report of said referee, is retained by the said receiver. A similar application was made to this court some months ago, with the result that the final report of the referee was confirmed, and the accounts of the receiver allowed as therein taken and stated, but the actual distribution of the fund with which the receiver was charged by the said report, and by the order of this court made thereon, was stayed until the decision, by the Court of Appeals, of appeals allowed by the Appellate Division from its order modifying, and affirming as modified, the order of the Special Term which had modified and confirmed, as modified, the second report of the referee taking and stating the receiver's account. The Court of Appeals, to which the matter was presented by permission of the Appellate Division, on certified questions involving the allowance of interest on the claims of preferred creditors of the defendant corporation, and on the dividend to be paid a specific claimant (Wickes, as receiver, etc.), has since rendered its decision upon the appeals allowed and heard. The receiver, therefore, makes this application for the order of final distribution, upon what he states to be the record, consisting of the order of the Special Term, above referred to, confirming the final report of the referee; the opinion and order of the Court of Appeals upon the appeals above referred to; the Appellate Division's order making the order of the Court of Appeals the order of this court; the original order of reference; the first report of the referee and the order of this court confirming the same; the second report of the referee, the exceptions of various creditors thereto, and the order of this court in part confirming and in part modifying said report; the order of the Appellate Division modifying in part and in part affirming the order last referred to; the referee's final report, and the notices of appearances and demand served by contesting unpreferred

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creditors who, upon the motion for final distribution of the fund, for the first time appeared by attorney. On the other hand the application is opposed by many unpreferred creditors, who object to the distribution (provided for in paragraph 3 of the proposed order accompanying the notice of motion and now submitted), by which the sum in the hands of the receiver, which would have gone to the preferred creditors of the defendant corporation by way of interest under the terms of the referee's second report, is divided proportionately among those four unpreferred creditors who were ascertained by the order of the Appellate Division as having alone excepted to the said report; and who desire, for the reasons set forth in their many opposing affidavits, that the funds in the hands of the receiver be deposited in court, or that the payment thereof to creditors be stayed, or that the actual distribution thereof be otherwise postponed until the rights of such opposing unpreferred creditors may be fully and finally determined. The direction in the proposed order and the actual distribution in accordance therewith, to which objection is so vigorously made, is identical with that made by the Appellate Division in its order modifying and affirming, as modified, the order of the Special Term modifying and confirming, as modified, the second report of the referee on the receiver's accounting; and the award by the appellate court of the fund in question to the unpreferred creditors who had filed proper, specific and timely exceptions to that report, and who were represented upon the appeal from the order modifying, and as modified, confirming that report, to the entire exclusion of all other unpreferred creditors, was based upon the facts, referred to by the appellate court in its opinion, "that the other unpreferred creditors have not pressed their claims nor put themselves in an attitude to receive the benefit of the ruling now made or to review that of the referee." Now, however, that an actual and final distribution is about to be made, the unpreferred creditors, to whose failure or omissions the appellate court called attention in the language above quoted, appear in opposition, contending in the affidavits now presented, that if they never excepted to the findings of the referee's second report, it was solely because they had never received notice of the filing thereof, and if they were not represented on the appeal from the order made upon the motion for the confirmation of that report, it was solely because they never were served with notice of such appeal; they, therefore,

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now insist that their time to file exceptions to said report has never been limited because it has never begun to run by the service upon them of notice of filing, and that the order made upon appeal did not bind them because they had no notice of and were not parties to the proceedings on appeal; and they, therefore, oppose the distribution of the fund until, by the filing, hearing and determination of their exceptions, they may be included in the class of unpreferred creditors, to whom the appellate court has awarded the fund in question. In addition to these many creditors, another, Hawkes, as executrix, contends in opposing affidavits, that, like the unpreferred creditors to whom the Appellate Division awarded the fund, she filed proper and timely exceptions to the referee's second report and was represented upon the appeal from the order made, upon the motion for the confirmation of that report, but was excluded from participation in the said fund by the order of the Appellate Division, and could not have her rights therein heard and determined by the Court of Appeals upon the appeal to that court above referred to; and she asks that, pending the determination of an appeal which she intends to take from the final order of distribution, and to which she claims to be entitled as a matter of right, and upon which a full and final adjudication of the reciprocal rights and liabilities of all the parties, with respect to the fund in question, may be made, the actual distribution be stayed, or, by the deposit of the fund in court or otherwise postponed. In support of these contentions she submits affidavits reciting the above facts, and referring to and incorporating practically the entire record of the proceedings had in this action. The hearing of the counsel for the excluded unpreferred creditors, and the reception and consideration, upon this application, of their opposing affidavits and papers, were opposed, by the unpreferred creditors to whom the fund in question was awarded, upon the grounds that the application is made exclusively upon the judicial record, and that this court is limited, in finally disposing of the fund, to the entry of an order in accordance with the directions of the orders of the Appellate Division and of the Court of Appeals. I am mindful of the fact that these opposing affidavits were received only upon the understanding that, if they were to be considered, the receiver and the successful unpreferred creditors should have an opportunity to examine them and to reply if desirable. First deciding the preliminary question thus raised,

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I think it proper to note the appearances and arguments of the counsel for the excluded unpreferred creditors, and to receive, consider and recite their opposing affidavits and papers; and I do not think that any answering affidavits on the part of the receiver and of the other unpreferred creditors could secure a fuller recognition and enforcement of their rights than I have decided to make upon the determination of this motion, for I have not been content to examine the meager record referred to in the notice of motion, but have scrutinized the entire record in the action and am thus acquainted with the facts to which answering affidavits would call attention. The application is made to the court, as a court of equity, to secure the final distribution of a fund in the hands of one of its officers and in which many persons have an enforceable interest. Though it may be that the court in making its order of distribution must necessarily follow the plan determined by the Appellate Courts, yet, when about to dispose of that fund beyond redemption, it should not fail to hear claimants complaining of the plan proposed, and especially when the regularity of the proceedings in which that plan was adopted, and the jurisdiction of the courts by which that distribution was ordered is, so far as concerns said claimants, denied or attacked. In a proceeding of this kind, involving assets of great value, concerning a great number of differently classified creditors, and requiring frequent judicial proceedings, many of which may be practically *ex parte,* it is not unlikely that claimants may not have been given the notice or received the service of the papers to which they are entitled, questions which could not ordinarily be raised before an appellate tribunal and to which such a court could not be expected to give its attention. It has been invariably held and has been the frequent practice of this court, that, in proceedings of this kind, a claimant may come in and be heard, and enforce his rights in the fund at any time before final distribution, upon such terms as the court deems just. And it is both just and proper, upon this application for a final order, to an appeal from which the unsuccessful parties would be of right entitled, to note the appearances and record the opposing papers of all contending parties, that the parties may have, and the court may give, upon that appeal a full, final and conclusive determination of all the issues raised. This course is, so far as the claimant Hawkes is concerned, further justified by the statement of the Court of Appeals at the end of its

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opinion, that as it is unable to relieve the said claimant from the alleged injustice of being excluded by the Appellate Division even as an unpreferred creditor because she did not appeal and because no question concerning her rights had been certified, she "must await the issue of another remedy." If, pending resort to that other remedy, the receiver moves for an order finally and fully distributing the funds, beyond redemption, and by which the rights of that claimant would be irreparably affected, shall her opposition not be heard or recorded? Such a contention would be inconsistent with equitable administration. Now, if by entertaining her opposition to this final motion, she may pursue the remedy suggested, and the court may make a final adjudication, from which she may appeal as a matter of right, and upon which appeal her rights may be fully and for all time determined, shall she be refused hearing? Such a course might work irreparable injury and would cause further litigation. This was evidently the view taken by the Special Term upon the first motion for the confirmation of the referee's final report, when, upon motion of said creditor, it resettled its order by reciting her appearance in opposition, and the opposing papers referred to and submitted by her, which comprised all the papers incorporated in the affidavit now submitted by her counsel, with the exception of those founded upon the subsequent proceedings in the Court of Appeals. For these reasons the appearance in opposition of all the excluded unpreferred creditors who appeared upon the argument should be noted in the order and their opposing papers recited therein; after, however, the other unpreferred creditors have, if they insist, examined the same and, if they deem it necessary, replied thereto — all of which may be considered upon the settlement of the order. Upon the merits of the application I think that, in finally directing distribution, this court can only adopt the plan directed by the Appellate Division, and order that the portion of the balance in the hands of the receiver which would have gone to the preferred creditors by way of interest under the terms of the referee's second report should be paid *pro rata* to those unpreferred creditors only whom the Appellate Division ascertained and named as having alone excepted to the said report. I feel compelled to regard all the facts set forth in the opposing affidavits and arguments as reasons rather for a delay in directing distribution than for making a change in that already directed by a higher court.

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As said in Matter of McBride, 6 App. Div. 376, "it would be subversive of the proper administration of justice to allow an order which has once been affirmed by the General Term to be questioned collaterally at Special Term, on the application for its enforcement." It is contended by counsel for the Seacord estate, one of the excluded claimants, that the decision of the Appellate Division, so far as it affects the rights of the unpreferred creditors who did not file exceptions, is purely *dictum*. Irrespective of the opinion of that court, it cannot, however, be properly said that its explicit order, adhered to persistently, notwithstanding different motions for reargument and resettlement, is entitled to no more weight than a mere *dictum*. The counsel for the said claimant truly says that the statute nowhere specifies upon what parties the notice of filing of a referee's report shall be served; that in such proceedings the great majority of creditors are always represented by attorneys, and that when they are not served with notice of filing a report they cannot be expected to file exceptions within the time limited therefor by the rule. But I must assume that, in making the disposition of the fund in question among those unpreferred creditors who had filed timely exceptions to the report, and in adhering to that disposition by denying subsequent motions for reargument and resettlement, the Appellate Division, knowing of the existence of the great number of unpreferred creditors, considered the question of the parties entitled to notice of filing the report of the referee and to an opportunity to except thereto, and thus determined the rights gained by those who filed timely exceptions and the rights lost by those who failed to file such exceptions. This conclusion of the Appellate Division I only discuss to the extent of stating that in these proceedings there is a difference between the rights required by the presentation by a creditor of a verified claim to a receiver and those arising from the appearance of that creditor in person or by attorney; by the former, he acquires only the right, in the absence of objection to his claim, to share in the distribution of the fund; by the latter, in addition to the presentation of his claim, he acquires, under the chancery practice which, in the absence of express statutory procedure, governs those proceedings, the right to notice of proceedings and service of papers, including notice of filing of the report. I have searched the entire record in vain for the recital of the appearance, in person or by attorney, at any hearing before the referee,

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of any of the excluded unpreferred creditors. I do not think, therefore, that they were entitled to notice of the filing of the report, and I conclude that the Appellate Division so held when it made and adhered to its determination to distribute the fund, created for the unpreferred creditors by sustaining the exceptions filed by certain unpreferred creditors, among those creditors alone who had filed such exceptions. The claimant the Fayerweather estate, upon this application, insists that it was satisfied with the order modifying and confirming, as modified, the second report of the referee, because after sustaining exceptions to the allowance of interest upon the preferred claims, it stated that, among the unpreferred creditors entitled to *pro rata* dividends upon the respective claims after payment of the commissions, expenses and the principal of the preferred claims, was included the said claimant; and the contention is made that as no notice of appeal from that order was ever served on the said claimant or its attorney, its rights under that order could not be disturbed. The said claimant, by a motion for resettlement of the order of the Appellate Division, presented this very point to the court, which, however, was overruled by the order denying that motion, entered December 5, 1902. It cannot, therefore, be considered here in opposition to the motion for the distribution of the fund as directed by the Appellate Court. The claimant Hawkes, as executrix, one of the unpreferred creditors, excluded from participation in the fund in question, insists, upon this motion, that unlike all of the other opposing unpreferred creditors, but like the unpreferred creditors to whom the fund was awarded, she filed proper and timely exceptions to the report of the referee allowing interest upon the preferred claims, was represented upon the appeal from the order made upon the motion for the confirmation of that report; and that, therefore, she should have been permitted to share in the distribution of the fund transferred, by sustaining these exceptions, from the preferred to the unpreferred creditors. The said claimant when she discovered that the Appellate Division had directed the distribution exclusively among the four other unpreferred creditors who had excepted to the report called the above facts to the attention of that court and moved for a resettlement of its order, and subsequently for a reargument of the appeal or for leave to appeal to the Court of Appeals. Both of those motions were denied, and

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as all the facts above recited were presented and considered upon those motions they should not now be heard to change the plan of distribution directed by the Appellate Court. It seems to me that the distribution made by the Appellate Division between the claimant Hawkes and the other unpreferred creditors who excepted to the report of the referee was due to the difference in the language of their exceptions; the former creditor excepted to the allowance of the claims of preferred creditors as stated in paragraph 14 of the report only in so far as any payments might have prevented payment in full of her two preferred claims, and to the allowance of interest in paragraph 21 on the claims of preferred creditors only in so far as payments may prevent payment in full of her said preferred claims and until her preferred claims were paid; whereas the latter creditors excepted to the allowance of any interest on the preferred claims, excepted to each and every part of paragraph 21, and specifically excepted to any part of the report as allowed any interest on claims of preferred creditors after the insolvency of the defendant and before the surplus assets, remaining after the payment of the preferred claims with contractual interest to the date of the insolvency of the defendant, have been applied to the payment in full of the unpreferred claims. In the orderly administration of the law, under the authority above cited and for the reasons above stated and disclosed by an examination of the record, I am, so far as the plan of distribution is concerned, constrained to follow literally and enforce the order of the Appellate Division. On the other hand, I am impressed by the subsequent language of the Court of Appeals, in which Mr. Justice Vann says, for the court (172 N. Y. 371, 381), that so far as they can see, the claimant Hawkes' complaint that injustice was done her by the decision of the Appellate Division "in excluding her even as an unpreferred creditor" seems well founded; and sitting in an equitable proceeding, I hesitate to authorize possible irreparable injury by placing a fund in the hands of an officer of the court beyond the reach or redemption of creditors until a full and final determination is had by the highest court of the question whether that suggested injustice has actually been inflicted, and if so, until it is fully overcome. A direction by this court that the fund be deposited would not suit either purpose. Its sole effect would be to release the receiver and his sureties from liability;

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the fund would be merely transferred to another individual official or depositary designated by the court, and would still have to be disposed of by some one in accordance with the final order of the highest court; and an order directing that deposit would in no sense be a final order, from which an appeal for the purpose of determining the rights and liabilities of all the parties could be taken as a matter of right. I think that, subject to the exception suggested below, the order of distribution should be signed as presented; but that a stay should be granted pending appeal upon condition that security for interest and costs be given the four unpreferred creditors now held to be entitled to the fund in question. If the computation is correct, and the figures could not be affected by any possible contingency to the detriment of the other parties, the order might incorporate the fair suggestion made by counsel for the four unpreferred creditors that as, in any event $20,000 will come to those creditors, it should be paid at once. Allowances will be inserted upon settlement of order, notice of which is directed to be given to all who appeared on the argument.

Ordered accordingly.

GEORGE W. DEASE, Plaintiff, *v.* THOMAS J. REESE, Defendant.

(Supreme Court, New York Special Term, January, 1903.)

Supplementary proceedings — Receiver — Future earnings — Vested interest in a pilots' organization.

A judgment creditor is entitled to have a receiver of the property of his judgment debtor appointed although his examination in supplementary proceedings discloses no property.

A judgment creditor cannot reach future earnings of his judgment debtor.

Where the judgment debtor, a pilot, has a valuable vested interest in the funds of an organization of licensed pilots, evidenced by a certificate of membership, that interest may be reached in supplementary proceedings and will pass to a receiver when appointed.

APPLICATION by a judgment creditor upon the examination of a judgment debtor in supplementary proceedings, for the appointment of a receiver of the latter's property, with the usual powers,

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and with directions to said debtor "to assign his interest in the funds of the pilots' association to said receiver, when appointed."

George C. d'Arcy, for plaintiff.

Lindsay, Kremer, Kalish and Palmer, for defendant.

FITZGERALD, J. Application by judgment creditor upon the examination of a judgment debtor in supplementary proceedings for the appointment of a receiver of the latter's property, with the usual powers, and with directions to said debtor "to assign his interest in the funds of the pilots' association to said receiver when appointed." Although the judgment debtor, who is a householder having a family to support, refers in his examination to different pilots' associations, yet the only one involved is evidently the United New Jersey Sandy Hook Pilots' Benevolent Association, an organization of licensed pilots, and although his interest in the funds thereof is vaguely defined in his examination, it is specifically stated in his certificate of full paid membership, the original of which is produced. This instrument, as explained by his examination, entitles him to draw and receive from the funds of the association; (a) $25 monthly during the continuance of his membership; (b) a salary at the rate of $200 monthly while on actual service, the actual amount thereof being conditioned on the number of days work actually performed by him; (c) a specified sick benefit of $100 or $75 monthly upon continued sickness or any calamity for specified periods; (d) a pension of $75 monthly upon his retirement from active service upon reaching the age of sixty-five years. The payment of the sums specified in subdivisions b, c and d is promised upon the condition that the net joint monthly earnings of the association should be sufficient to meet such payment in full, otherwise the amounts named therein shall be reduced proportionately. Furthermore, the certificate provides that if he shall cease to be a pilot, except by retirement at his own option, his connection with the association shall terminate, and benefits connected therewith shall be surrendered, and the association shall be released from any liability under the certificate; and he shall accept in lieu thereof such a sum as shall equal that paid by him for his certificate, plus such further sum as he would have received if the undivided surplus earnings of the association after deducting therefrom the current

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expenses of the United New Jersey Sandy Hook Pilots' Association had been divided monthly among the members thereof during the continuance of the membership in proportion to the number of days work done by each member entitled to a share of such surplus. In like manner it is again stated that a sum computed as in the foregoing provision shall, in the event of his death, be distributed as provided by his last will and testament, or in accordance with the Statute of Distributions of the State of New York. The examination discloses that the debtor originally paid $1,000 for the certificate in question by "working it out at the time of the organization"; that from the earnings of the pilots, members of the association, the expenses are reduced, and if the balance is sufficient, each pilot is paid at the rate of $200 monthly, according to the number of days during the month he has worked; if a balance still remains, a portion is put into the fund for the building of steamboats for pilotage, which are the joint property of the association, and which are now two in number, of value unknown to the debtor; and if any further sum then remains, it is equally divided among the men from time to time. At present the certificate is valued at $1,800. The fundamental objection to a direction by the court, as requested by the judgment creditor, that the debtor "assign his interest in the funds of the pilots' association" to the receiver to be appointed, is that the certificate issued by the association, which constitutes the contract between the association and the debtor, and by which his interest in its funds is created and defined provides that his "membership and the certificate thereof are not transferable or divisible in any manner or shape, nor available to any other person than the member," and only as specified in the certificate; and that they are subject to the conditions of the articles of association and amendments thereof. It is evident from an examination of the provisions of the certificate that it is both the purpose and the right of the association, as expressed in the contract of membership, to keep its membership composed exclusively of pilots, and the membership of the debtor in the association is dependent upon and cotemporaneous with his service as a pilot, his connection with the association terminating and all rights thereunder being surrendered if he should cease to be a pilot in any manner other than by his retirement from active service at the age of sixty-five years. The court cannot and should not, by

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directing the debtor to assign his interest in the association, interfere with the purpose of the association or impair the rights expressed in the contract of membership by admitting to a share of the benefits a person other than a pilot, against the expressed prohibition of the certificate of membership; and again, it should not direct a judgment debtor to make an assignment which, by the terms of his contract with others, it is impossible for him to make without violation to or impairment of the contractual rights of those other persons (Columbian Institute v. Cregan, 11 Civ. Pro. 87, and cases cited). Furthermore, while it is true that although membership in the association and interest in its funds are dependent upon continued service as a pilot, the right to act as pilot is not conditioned upon membership in this association; yet if, as it is probable, all the pilotage is done by members of this association, and if the direct or indirect consequence of an order by this court to the debtor to assign his interest in the association would be to interfere with the future pursuit of his vocation, which is clearly necessary for the support of himself and his family, such a direction should not be made. See Tripp v. Childs, 14 Barb. 85. Finally, the interest of the debtor in the association partly consists of his right to receive for his future services a salary at the rate of $200 monthly and to have reserved for him his proportionate share of the future undivided surplus earnings of himself and his associate members; and to this interest, so far as it is represented by his right to future salary and to a share of future net earnings, the title of a receiver could not attach and the direction that the same be assigned to a receiver would be improper. Browning v. Bettis, 8 Paige, 568; Stewart v. Foster, 1 Hilt. 505; Potter v. Low, 16 How. Pr. 549; Gerregani v. Wheelwright, 3 Abb. (N. S.) 264; Merriam v. Hill, 1 Wkly. Dig. 260; Woodman v. Goodenough, 18 Abb. Pr. 265; Tolles v. Wood, 16 Abb. N. C. 1; Caton v. Southwell, 13 Barb. 335; Albright v. Kempton, 4 Civ. Pro. 16; Columbian Institute v. Cregan, *supra;* Dubois v. Cassidy, 75 N. Y. 298. Any order for the assignment or delivery of the property of the judgment debtor should, therefore, if made, be general. Browning v. Bettis, 8 Paige, 568. It may, however, be contended that a receiver of the judgment debtor should not be appointed because no property has been disclosed; for the certificate of membership in question states that its contents shall not be "construed as constituting any property or

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estate which can be mortgaged or pledged for the payment of debts or as giving any legal right to collect, sue or demand any payment whatsoever, but shall be construed as the expression of the solemn intention of the members of the association to make the voluntary payments specified, and not as a joint or several liability of the association or its members, for the payment of any sum whatsoever." While, as it is said in the note to De Vivier v. Smith, 6 Civ. Pro. 394, 396, that the practice is not to appoint a receiver unless some property has been disclosed, yet the authorities uniformly declare the right of the judgment creditor to the appointment of a receiver, irrespective of the fact whether or not the examination indicates the existence of property. Lent v. McQueen, 15 How. Pr. 313; Myres' Case, 2 Abb. Pr. 476; Webb v. Overmann, 6 Abb. Pr. 92; Bloodgood v. Clark, 4 Paige, 574; Fitzburgh v. Everingham, 6 id. 29; Browning v. Bettis, 8 id. 568; De Camp v. Dempsey, 10 Civ. Pro. 210. Again, the examination indicates that there may be bills for pilotage made by the debtor prior to the date of the service of the order for his examination and not yet collected, and to which the title of a receiver might attach. If they consisted of moneys earned within sixty days prior to said date, that fact does not appear, and to secure the exemption arising from that fact it was the debtor's duty to prove the fact. Finally, notwithstanding the language of the certificate, it seems to me that the debtor has a vested interest in its funds, although subsequent events, for which the debtor could not hold the association or its members liable, may render the interest of no value. At the time of the service upon the judgment debtor of the order for his examination, which is the date upon which the title of the receiver would vest, the judgment debtor by his previous service had earned moneys which, if he elected by resigning or withdrawing, or if he was expelled or his license as a pilot was revoked, would not only then become immediately due and payable, but which were then capable of absolutely accurate computation, being the sum paid for his certificate, viz., $1,000, and the additional sum which he would have received if the undivided surplus earnings of the association, after the deduction of current expenses, had been divided monthly among the members during the continuance of his membership to said date, in proportion to the number of days' work done by each member entitled to a share of such surplus. If the

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motion for a receiver were denied, and if the restraint upon the judgment debtor, which must be inserted in the order appointing a receiver (People ex rel. Morris v. Randall, 73 N. Y. 416), were not imposed, the debtor at any future time, or by his voluntary act of withdrawing from the association, or upon his expulsion, or upon the revocation of his license as a pilot, would be enabled to receive the aforesaid sums free from the just claims of his creditors, although as far as the rights of the debtor are concerned, they were due and capable of definite ascertainment as of the date when the title of receiver would vest. As was said in Browning v. Bettis (*supra*), "where all the services, to entitle the defendant to his salary or compensation, have been rendered at the time of filing the complainant's bill, such salary or compensation may be reached by the creditor; although it had not become actually payable when the bill was filed." As an indication that a receiver may be appointed, and may maintain an action upon an instrument when the judgment debtor has a vested interest therein, see Masten v. Amerman, 51 Hun, 246. For the above reasons the motion for the appointment of a receiver must be granted and the usual general order therefor must be made.

Motion granted.

EDWARD S. MINOR, Plaintiff, *v.* WILLIAM B. GURLEY et al., Defendants.

(Supreme Court, New York Special Term, January, 1903.)

Attachment — A debt is "goods or effects" within Code C. P., § 657 — Sheriff.

A sheriff may impanel a jury to try the validity of a claim, made by a third party, that a debt which the sheriff has attached as belonging to the defendant in the action really belongs to the third party, and this because a debt, although incapable of manual delivery, must be deemed "goods or effects" within Code C. P., § 657, and the sheriff, if he holds his levy on the debt, is entitled to be given a bond by the plaintiff in the action.

APPLICATION for an order restraining the sheriff from proceeding by a sheriff's jury to try the title of attached property for the purpose of obtaining a bond.

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Noble, Hasbrouck & Davis, for plaintiff.

Van Ingen, Seibert & Paddock, for defendants.

John J. Adams, for sheriff.

FITZGERALD, J. Section 649 of the Code of Civil Procedure provides how a levy under a warrant of attachment is to be made; by its first subdivision "upon real property," by its second subdivision "upon personal property capable of manual delivery" and by its third subdivision upon "other personal property." The words "other personal property," as used in this subdivision, must be held to apply to personal property not capable of manual delivery. The sheriff, upon making the levy, may become liable in two ways — to a claimant for an improper levy; or to the plaintiff for failure to make a proper levy. To protect him under such conditions provision is made for trying the claim by a sheriff's jury, and while it is undisputed that such a proceeding is regularly provided for regarding the kinds of property embraced in the first and second subdivisions of the before-mentioned section, it is insisted that there is no authority in law for determining a claim to intangible property incapable of manual delivery, and an order is asked for restraining the sheriff from proceeding by a sheriff's jury to try the title of attached property for the purpose of obtaining a bond (§§ 657, 658), a notice of claim by third parties as owners of the property in question having been regularly served upon him. The property attached is a chose in action, a debt, and the attaching creditor contends that the sheriff must proceed to reduce it to a chose in possession first and thereafter try the question of title. Reliance for this contention is reposed upon the phrase "goods or effects" as used in section 657. These words, it is argued, are words of limitation and embrace only tangible property. The question is a novel one and I have not been referred to any adjudication in this State defining the phrase. In State v. Newell, 1 Mo. 248, it was held that "effects in law must mean everything which is subject to the laws of property and ownership, whether real or personal; and of the personalty whether of possession or in action." The sole purpose of trying claims by sheriff's jury under the common law and by the Code provisions has at all times been to protect the sheriff; to enable him to require a bond from the attaching cred-

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itor or release the levy, as was said by Ingraham, J., in Cohen v. Climax Cycle Co., 19 App. Div. 159, it is "a summary method by which the sheriff may cause an investigation to be made, as to the title of any one claiming goods upon which he has levied, * * * and the only effect of the verdict is that in case it is in favor of the claimant, the execution or attachment creditor is compelled to give a bond of indemnity to the sheriff to protect him as against such claimant." The finding of such jury has never been held to be decisive on the question of title. By section 1420 it is provided in express terms that the finding shall not prejudice the right of the claimant to sue the sheriff for a recovery of his property. It would be straining the statute harshly against a public officer to hold, in the absence of express language to that effect, that while as to some kinds of property levied upon he was entitled to protection, that as to other kinds of property he was required to levy or refuse to levy at his peril, but conceding that the position of plaintiff is correctly taken, his rights can in no way be affected by the proposed action of the sheriff, for if that action is without warrant in law the findings of the jury would be a nullity.

Motion denied, with $10 costs.

THE NINTH NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff, v. MORRIS MOSES and JAMES T. FRANKLIN, as Receivers of the Property of Lesser Brothers, TOBIAS LESSER, ISRAEL LESSER, SIMON LESSER, BERNARD MOSES, EMELIE MARCUS, TOBIAS LESSER as Guardian of the Property of HARRY, IRVING and REUBEN LESSER et al., Defendants.

(Supreme Court, New York Special Term, January, 1903.)

Judgment creditor's action — Motion by the trustee in bankruptcy of the debtors for his substitution as plaintiff.

Where a judgment creditor of a firm brings an action to set aside certain firm transfers, confessions of judgment, executions thereon, and conveyances, all relating to firm property, and serves the summons therein on one partner of the firm more than four months before it files a petition in bankruptcy, the judgment creditor acquires a lien, enforcible for its exclusive benefit, upon all the choses

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in action and equitable assets of the firm, and therefore the trustee in bankruptcy of the firm has no title upon which to demand that he be substituted as plaintiff, in the action, in the place and stead of the creditor, to the end that he may prosecute the action for the benefit of the estate of the bankrupts.

MOTION on petition of Benjamin Barker, Jr., as the trustee in bankruptcy of Lesser Brothers, to have said trustee substituted as plaintiff in this action, in the place and stead of the Ninth National Bank of the city of New York.

Johnson & Hess (Otto T. Hess, of counsel), for petitioner.

Rollins & Rollins (Nelson S. Spencer, of counsel), for plaintiff.

GILDERSLEEVE, J. This is a motion on behalf of a trustee in bankruptcy to have himself substituted as plaintiff in this action, which is a judgment creditor's action to set aside certain transfers, confessions of judgment, executions thereon, and conveyances of real estate, made by the Lesser Brothers, the judgment debtors, on October 2, 1896.

The facts appear to be substantially as follows, viz.: On October 2, 1896, the defendants Tobias Lesser, Israel Lesser and Simon Lesser, then doing business as copartners under the name of Lesser Brothers, confessed a number of judgments upon which executions were issued, made a number of assignments of book accounts and of the money due or to become due to Lesser Brothers thereon, and executed and delivered deeds of certain pieces of real property. Thereafter, and on the same day, Tobias Lesser and Israel Lesser brought an action against Simon Lesser for a receivership of the copartnership property of Lesser Brothers, which action was not defended, and on November 13, 1896, judgment was entered in favor of the plaintiffs in said action, and the defendants Moses and Franklin were appointed and qualified as permanent receivers. On May 12, 1899, the Lesser Brothers filed a petition in bankruptcy, and were duly adjudged bankrupts, and on June 7, 1899, the petitioner herein, Mr. Benjamin Barker, Jr., was duly appointed trustee of said bankrupts. He duly qualified as such trustee and entered upon the discharge of his duties. It appears that by these judgments, assignments,

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transfers, conveyances and the receivership aforesaid, Lesser Brothers disposed of the greater part of their property, and the debts of the bankrupts amount to about $230,000 over and above their assets. On February 23, 1900, the said trustee brought an action to set aside the said judgments, assignments, transfers, conveyances and receivership, and on March 27, 1902, an interlocutory judgment was entered in favor of the trustee for the relief demanded, except as to a small proportion of such judgments, transfers and conveyances. By said interlocutory judgment a referee was appointed to take and state the accounts of the several transferees and of the receivers. This proceeding is still pending before said referee, and the various transferees set up, as an objection to the entry of final judgment in said action, the fact that certain other judgment creditors' actions, including the case at bar, are pending, and that by reason thereof the said transferees cannot pay over the moneys and properties, so transferred to them by Lesser Brothers, as aforesaid, to the trustee, for the reason that said judgment creditors, including the plaintiff in the case at bar, claim a lien on the assets in question by virtue of the commencement of their said actions.

A sharp dispute is raised as to whether or not the case at bar was commenced within four months previous to the filing of the petition in bankruptcy. The plaintiff claims it was not, while the trustee maintains that it was. The petition was filed, as we have seen, on May 12, 1899, and plaintiff claims that this action was commenced by the service of the summons on Simon Lesser on May 27, 1898, nearly a year previous to the filing of said petition.

Subsequent to April 1, 1899, the other defendants have either been served with process or have voluntarily appeared in the action. The cause of the delay in further proceeding with the action, after the service of process on Simon Lesser, was the desire of the plaintiff to await the result of another action involving the issues raised in the case at bar.

In the cases of Roberts v. A. & W. S. R. R. Co., 25 Barb. 662, Lynch v. Johnson, 48 N. Y. 33, it was held that as soon as a judgment creditor's suit is commenced, the plaintiff in that suit obtains a lien on all the choses in action and equitable assets of the judgment debtor, and that all the title the judgment debtor has, or can assign to another, is subject to that lien.

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In the case of First Natl. Bank v. Shuler, 153 N. Y. 171, Chief Judge Andrews used the following language, viz.: "The rule is well settled in this state that the plaintiff in a creditor's action acquires, by the commencement of the suit, a lien upon the choses in action and equitable assets of the debtor, which entitles him, in the successful event of the action, to priority of payment thereout in preference to other creditors, irrespective of the priority of the respective judgments."

Section 67f of the Bankruptcy Act provides that "all levies, judgments, attachments, or other liens, obtained, through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

Section 67b of the same act provides that: "Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

In the case of Patten v. Carley, 69 App. Div. 425, Mr. Justice Bartlett uses the following language, viz.: "If (the creditor's lien is) acquired more than four months before the commencement of the bankruptcy proceeding, his lien would inure to his own exclusive benefit; but, if acquired at any time within the four months, it would be null and void, under subdivision f, of the section (Bankruptcy Act, § 67f), except as preserved for the benefit of the estate as provided in that subdivision and in subdivision b."

In Metcalf v. Barker, published in the New York Law Journal of December 23, 1902, the Supreme Court of the United States

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held that where a judgment creditor's action was commenced more than four months prior to the filing of a petition in bankruptcy against the judgment debtor, who was subsequently adjudicated a bankrupt, the lien thus obtained on the bankrupt's equitable assets is superior to the title of a trustee in bankruptcy thereto, and the bankruptcy court was without jurisdiction to enjoin the judgment creditor from enforcing a judgment obtained in his equity action.

From the foregoing authorities, it is evident that the question to be here determined is whether or not the case at bar was commenced more than four months prior to the filing of the petition in bankruptcy.

The Code, in section 416, provides that: "A civil action is commenced by the service of a summons." In the case at bar, as we have seen, the summons was served on May 27, 1898, on Simon Lesser, one of the judgment debtors. We have also seen that the judgment debtors were copartners in business, and the property sought to be recovered is conceded to be wholly copartnership property. In a judgment creditor's action the judgment debtor may be said to be the principal party defendant. I am of the opinion that the service of the summons on Simon Lesser, under the circumstances of this case, was a commencement of the action. It, therefore, follows that the lien of the plaintiff, as a judgment creditor, on the equitable assets of the judgment debtors, the bankrupts aforesaid, is superior to the title thereto of the trustee in bankruptcy. Metcalf v. Barker, *supra*.

The plaintiff's counsel raises an additional point by claiming that, even if the suit had been commenced within the four months, the trustee would not be vested with the lien or entitled to enforce it in this action. It is not necessary, however, to enter into a discussion of that branch of the case, in view of the conclusion already reached, as above indicated.

The motion is denied, without costs.

Motion denied, without costs.

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AMBROSE K. ELY, Plaintiff, *v.* ANASTASIO C. M. AZOY, as Trustee under a certain deed made by JOHN A. C. GRAY and SUSAN M. GRAY to said ANASTASIO C. M. AZOY, bearing date June 30, 1898; impleaded with CHARLES PRILMER et al., Defendants.

(Supreme Court, New York Special Term, January, 1908.)

Ejectment — Demurrer to complaint — Tax sale in New York city in 1883 — Publication of notice of sale and of notice of redemption.

Where a plaintiff elects to frame his complaint in ejectment so as to set out in detail the facts upon which his claim of title rests, the defendant may demur, for, unless the facts support the plaintiff's claim, his subsequent allegation of ownership, or of title, is merely an unwarranted conclusion of law.

The Consolidation Act (L. 1882, ch. 410) did not operate to arrest proceedings then pending to sell property in the city of New York for non-payment of taxes nor did it take from the city comptroller the power to proceed to carry out the sale.

A complaint, in ejectment, by one claiming under a sale of New York city property for unpaid taxes, conducted under L. 1871, ch. 381, first advertised for March 5, 1883, and made on May 8, 1883, is demurrable where it fails to allege that the notice of the sale was published in the official journal established by L. 1871, ch. 574 and that notice to redeem therefrom was published by the clerk of arrears either in the City Record or in a specially authorized newspaper, as required by L. 1882, ch. 410, § 66.

ACTION in ejectment. Demurrer to complaint. The Consolidation Act (Laws of 1882, chap. 410) went into effect March 1, 1883.

Smith & Simpson, for plaintiff.

Zabriskie, Burrill & Murray, for defendants.

SCOTT, J. This is an action in ejectment wherein the plaintiff, claiming under a tax sale, seeks to recover possession of the premises described in the complaint. The plaintiff has elected to so frame his complaint as to set out in detail the facts upon which his claim of title rests. Where this method of pleading is

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adopted it is open to the defendants to test the claim by demurrer, for unless the facts alleged support the claim, a subsequent allegation of ownership or title is merely an unwarranted conclusion of law. Masterson v. Townshend, 123 N. Y. 458. The sale under which plaintiff claims was for the unpaid taxes and water rents of the years 1877, 1878, and 1879, and the proceedings leading up to the sale were conducted under the provisions of chapter 381, Laws of 1871. The sale itself was first advertised for March 5, 1883, and after adjournment was held on May 8, 1883, so that the sale itself and the proceedings subsequent thereto took place after the passage of the Consolidation Act of 1882. The demurrant raises many objections to the sufficiency of the proceedings. The principal one is that the Comptroller had become, by the passage of the Consolidation Act, bereft of power to make any sale at all. Section 3 of chapter 383, Laws 1871, under which proceedings looking to a sale were begun, provides that if, notwithstanding the notice of sale, the owner or owners shall neglect or refuse to pay the taxes with interest and charges, then it shall be lawful for the clerk of arrears, under the direction of the comptroller, to cause the lands and premises to be sold, and such sale shall be made on the day and at the place for that purpose mentioned in the advertised notice, such day being in the present instance March 5, 1883. It is evident that the clerk of arrears or the comptroller had no power to make the sale until the day specified in the notice had arrived, so that, at the date the Consolidation Act went into effect, the power to make a sale was still incomplete or inchoate. The Consolidation Act contained a complete scheme for the sale of lands for unpaid taxes and water rates (§§ 926–954), and it is claimed that it repealed all prior enactments providing for and regulating such sales. Heckmann v. Pinkney, 81 N. Y. 211; Matter of Inst. for Deaf and Dumb, 121 id. 234. The Consolidation Act, however, although a new law, was intended to be a compilation and codification of a great number of acts relating to the city of New York, and undoubtedly operated to repeal absolutely all inconsistent provisions of the former laws, and all provisions of former laws omitted in the consolidated statute. But as to provisions re-enacted in the Consolidation Act in the same words which were used in the former act, or in different but equivalent words, the law must be regarded as continuous, and the new act as to such parts will

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not operate as a repeal of the former acts so as to defeat a public remedy or to put an end to proceedings properly begun. Matter of Estate of Prime, 136 N. Y. 347. A comparison of the Consolidation Act with the earlier statutes relating to the sale of lands for unpaid taxes and water rates shows that the former statutes were re-enacted practically, if not exactly, in the identical language. The act did not, therefore, operate to arrest the proceedings to sell the property in suit, nor to deprive the comptroller of the power to proceed to carry out the sale.

The complaint fails however in at least one particular, to show that the proceedings were regularly conducted. The allegation as to the publication of the notice of sale is that it was advertised "once in each week successively for three months in ten of the daily newspapers printed and published in the city of New York." This complies with the requirements of section 3 of chapter 381, Laws of 1871. Soon after the passage of this act, however, the Legislature passed chapter 574, Laws of 1871, amending the charter of 1870. By this act there was established an official journal in which was required to be advertised "every notice of advertisement, corporation or legal, which may be required by law or ordinance to be published in one or more papers in the city or county. If such notice or advertisement is required to be published in only one newspaper, then such publication shall be in such paper, but if such notice or advertisement is required to be published in more than one paper, then one of such requisite papers shall be the paper so designated in the official journal." There can be no doubt that the notice of a sale for unpaid taxes fell within the description of notices required to be advertised in the official journal. Unless the publication was in fact made in that journal it would be a nullity and could furnish no legal basis for a sale. The complaint does not show that it was so published, and, therefore, does not show that the proceedings ever had a legal inception. Section 941 of the Consolidation act required the clerk of arrears to publish an advertisement, at least twice in each week for six successive weeks in one of the daily newspapers printed and published in the city, that unless the lands and tenements sold be redeemed by a certain day they will be conveyed to the purchaser. Section 66 of the same act, providing for the publication of the official journal, known as the City Record, requires that all public advertising shall be done in

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that paper, except that an advertisement required by law may be published elsewhere if such publication is authorized by the concurrent vote of the mayor, corporation counsel, and commissioner of public works. Under this section the advertisement by the clerk of arrears should have been inserted either in the City Record or in a newspaper specially authorized. The complaint does not show that it was published in either way. It merely alleges that it was published in a daily newspaper, printed and published in the city of New York. It should allege either that it was published in the City Record or in a specially authorized newspaper. Other alleged defects in the allegations respecting the proceedings are insisted upon which it is not necessary to consider now. Some of them, if defects at all, can be more appropriately reached by a motion for a bill of particulars than by a demurrer. Since, however, the demurrer must be sustained for the reason already noted, the plaintiff will be able by an amended complaint to meet, if the facts permit, the other reasonable objections to his present pleading.

Demurrer sustained, with costs, with leave to plaintiff to amend within twenty days, on payment of costs.

Demurrer sustained, with costs, with leave to plaintiff to amend within twenty days, on payment of costs.

THE NEW JERSEY CONSTRUCTION CO., Plaintiff, *v.* THE FARMERS' LOAN & TRUST CO. et al., Defendants.

(Supreme Court, New York Special Term, January, 1903.)

Negligence — Domestic corporation when not bound to take notice of a foreign law.

A domestic trust company, performing a domestic trust agreement, making it the depositary of the stock of four railroads, about to be consolidated, and charging it with the duty of issuing new stock to the holders of the original stock, is not, without actual knowledge thereof, chargeable with knowledge of a foreign law — different from our own — providing that no sale, assignment, or transfer of the stock of a railroad corporation should affect the rights of an attaching creditor until recorded on the books of the

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corporation or until a new certificate is issued to the person to whom the stock has been transferred, and, therefore, where, in the foreign State, a creditor of a depositor of foreign stock is enabled to attach and sell it because the trust company has not had it transferred to itself, no negligence is imputable to the trust company.

MOTION to confirm the report of a trustee.

Isaac N. Miller, for claimant.

David McClure, for defendants.

SCOTT, J. If the question was presented as an original proposition I should entertain much doubt whether the exceptant could properly raise the question of the alleged negligence of the defendant trust company in this proceeding. That question was, however, raised by the exceptions filed to the trust company's final report of distribution, and the order of reference made thereon amounted to a recognition by those assenting to it, which included the defendant trust company, of the exceptant's right to raise the question. That question I therefore consider as settled. I do not find, however, that the defendant trust company was guilty of negligence. It is sought to be imputed to them as negligence that they omitted to have transferred to themselves upon the books of the New York & New England Railway Company certain shares of stock deposited with them under a trust agreement. The agreement under which the stock was deposited contemplated that the stockholders of four railroads should deposit their stock with the Farmers' Loan & Trust Company, which was to act as trustee in the consolidation of the four roads, and to issue new stock to the holders of the original stock, issuing in the meantime its own certificates representing the stock so deposited. This scheme was never fully carried out, and the present action was brought for a determination of the trust and to fix the rights of the parties to the property held in trust. The judgment directed the trust company, among other things, to sell certain of the stocks, including 235 shares of New York & New England stock originally belonging to one Edward Crane. When the trust company, pursuant to the direction of the judgment, undertook to sell these shares, it learned for the first time that, although it had held the certificates of stock, certain

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creditors of Edward Crane had attached and sold the stock in Massachusetts. This was done under a statute of the State of Massachusetts, providing that no sale, assignment or transfer of the stock of a railroad corporation shall affect the title or rights of an attaching creditor until it is recorded on the books of the corporation, or a new certificate is issued to the person to whom it has been transferred. If the defendant trust company had caused Crane's transfer to itself to be recorded, or had taken out new certificates in its own name, Crane's creditors could not have attached and sold his shares, and it is because it did not do this that the trust company is now charged with negligence. The trust agreement did not in terms require the trust company to have the deposited stock transferred to its own name, though under certain circumstances the fulfillment of the trust might have required this to be done, as, for instance, if there had been dividends to collect, or officers to elect. It does not appear that there ever were any dividends to be collected, or that the trust company ever received a controlling amount of the stock. Under the common law, and under the laws of this State, it was quite unnecessary to have new certificates issued to protect the stock against attachment and sale by a creditor of one who had assigned it to the trust company. The trust company did not in fact know of the existence of the Massachusetts statute, and cannot be convicted of negligence in failing to guard against it, unless it was bound to know and take cognizance of the law of Massachusetts. In the absence of any actual knowledge on the part of the trust company of the peculiar provision of the Massachusetts statute, it was entitled to presume that the law of that State was the same as the law of this State, especially as the contract under which the stock was deposited was a New York contract to be performed in the State of New York. The mere fact that the railroad company was a Massachusetts corporation did not impose upon the trustee the duty of inquiring whether or not the Massachusetts law was the same as our own. Leslie v. Baillie, 2 Younge & Collyer N. R. 91. The exceptions to the referee's report must be overruled, and the motion to set aside the report be denied, and the motion to confirm the report granted, with $10 costs.

Motion granted, with $10 costs.

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Matter of the Judicial Settlement of the Accounts of FRANK A. TIMERSON and GENIE TIMERSON, as Administrators, Etc., of CHARLES W. TIMERSON, Deceased.

(Surrogate's Court, Cayuga County, January, 1903.)

Administration — Right of retainer — Delivery necessary to a gift.

Administrators have a right to retain from distributive shares the amount of outlawed promissory notes of the distributees which they owed the intestate at the time of his death.

His expressed intention to forgive the distributees their debts is ineffectual to constitute a gift where he never delivered to them the notes representing the debts.

PROCEEDING upon the judicial settlement of the accounts of administrators.

F. S. Coburn, for administrators.

John L. Hunter, for Charles A. and Ned Timerson, contestants.

Horton & Brown, for William H. Timerson and Marian Murphy.

WOODIN, S. The above entitled proceeding was instituted by Frank A. Timerson and Genie Timerson for a judicial settlement of their accounts as administrators, etc., of Charles W. Timerson, deceased. An answer containing objections to the account was filed by Charles A. and Ned Timerson.

The above-named deceased died intestate on August 7, 1901, leaving Genie Timerson, his widow, and Frank A. Timerson, William H. Timerson, Marian Murphy, Ned Timerson and Charles A. Timerson, his children, and only heirs-at-law. Letters of administration were issued out of this court to said Genie and Frank A. Timerson on the 15th of August, 1901.

The administrators charged themselves in their account, as part of the assets of the deceased, with certain promissory notes.

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in favor of the deceased, made by Charles A. Timerson and Ned Timerson, respectively, more specifically set forth as follows: One note, dated March 22, 1889, for $145, made by Ned Timerson; one note, dated August 1, 1895, for $124, made by Ned Timerson; one note, dated April 20, 1889, for $250, made by C. A. Timerson; one note, dated September 2, 1889, for $200, made by C. A. Timerson; one note, dated April 1, 1891, for $150, made by C. A. Timerson; and the account contains the further statement that these notes should be deducted from the respective shares of said parties in the estate.

The answer alleges that these notes are not valid or subsisting claims against the makers, and that they are not liable for the payment of the same and that all of said notes are barred by the Statute of Limitations; and further, that the deceased did not intend to collect or enforce payment of said notes or any of them, and regarded said notes as having been paid and did not hold them in his possession as evidence of a collectible debt or obligation due to him.

Upon this issue, as raised, proof has been offered by the contestants and other parties to this proceeding.

Taking up, first, the allegation in the answer that the notes are barred by the Statute of Limitations, I believe the rule of law to be well settled in cases of this kind, that the administrators have a lien and a right of detention upon the distributive shares sufficient to pay the indebtedness to the estate, and it is the duty of the court to make a decree accordingly. The rule is based upon the theory that the Statute of Limitations does not raise a presumption of payment, but merely creates a bar to the remedy by action. In this proceeding the administrators are not seeking to recover the claims, and as no presumption of payment arises from the lapse of time, they are assets in the hands of the administrators, for which they must account. It is not a mere question of legal offset, but of equitable lien and right of retainer, and the right depends upon the principle that the distributee is not entitled to his distributive share while he retains in his own hands a part of the fund out of which that and other distributive shares ought to be paid. Rogers v. Murdock, 45 Hun, 30. Taking this view of the matter, that leaves to be decided, as the sole remaining question, the contestants' allegation that the decedent did not intend to collect or enforce payment of said notes or any of them,

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and regarded them as having been paid and did not hold them in his possession as evidence of a collectible debt or obligation due him.

To support this contention, the contestants have offered proof tending to show that the deceased had forgiven or condoned the indebtedness. It appears from the proof that the deceased died with these notes in question in his possession, and the administrators found them among his papers. There being no question but what the notes were valid in their inception, in the absence of any proof showing payment or gift of the indebtedness, the administrators would be entitled to the usual presumption which the possession of these evidences of indebtedness would raise, and could properly ask for a decree directing that these notes be deducted from the distributive shares of the makers. The proof offered by the contestants consists of declarations made by the deceased to certain of his friends and neighbors, and it is to be determined whether these declarations overcome the legal presumption to which the administrators are entitled by virtue of their possession of these uncanceled notes. These declarations must show either payment or a gift. Mr. Bloomingdale, a neighbor and friend of the deceased, testifies that he had a talk with the deceased in the spring of 1901, in which the deceased stated "that he had settled with his children and that they were square now; that he was going to give that to them; that he was going to call square what Frank, Ned and Albert owed him, and was not ever going to ask them for it." Mr. Bloomingdale states that the deceased did not refer to any notes or give any figures or amounts. Mr. Herson J. Lewis testifies to a conversation with the deceased in the spring of 1901, in which the deceased stated "that he did not expect to enforce payment of the notes, for the reason that he could not collect them." In this talk, the deceased said, in answer to Mr. Lewis' question, why he did not deliver up the notes, that "it would keep them better natured if I hold them awhile." Mr. Charles Myers testifies that he had a talk with the deceased, in April or May, 1901, and that the deceased said "he had given Ned four or five hundred dollars, and that he had now got through, and what Ned got thereafter he had got to settle for." Mr. Ryder's testimony is to the effect that the deceased told him "he had always helped his boys and that what he had given them was gone; he had given that to them,

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but that he had got through now." The deceased made no reference to any particular loan or obligation. This consists of all the evidence, in substance, bearing upon the payment or discharge of these notes. I think the intention of the deceased not to prosecute these claims is fairly inferable from these declarations, and I would be strongly disposed to carry out that intention in ordering distribution, if possible. There is no proof that the notes in question have been paid, and, of course, there must have been a gift by the deceased to the contestants of these notes in order to sustain their position. The courts have defined what elements are necessary to constitute a valid gift. In Beaver v. Beaver, 117 N. Y. 428, the court says: "The elements necessary to constitute a valid gift are well understood and are not the subject of dispute. There must be on the part of the donor an intent to give, and a delivery of the thing given, to or for the donee, in pursuance of such intent, and on the part of the donee, acceptance. The subject of the gift may be chattels, choses in action, or any form of personal property, and what constitutes a delivery may depend on the nature and situation of the thing given. The delivery may be symbolical or actual, that is, by actually transferring the manual custody of the chattel to the donee, or giving to him the symbol which represents possession. In the case of bonds, notes or choses in action, the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention; and so, also, where the debt is that of the donee it may be given, as has been held, by the delivery of a receipt acknowledging payment. The acceptance, also, may be implied where the gift, otherwise complete, is beneficial to the donee. But delivery by the donor, either actual or constructive, operating to divest the donor of possession of and dominion over the thing, is a constant and essential factor in every transaction which takes effect as a completed gift. Anything short of this strips it of the quality of completeness which distinguishes an intention to give, which alone amounts to nothing, from the consummated act, which changes the title. The intention to give is often established by most satisfactory evidence, although the gift fails. Instruments may be ever so formally executed by the donor, purporting to transfer title to the donee, or there may be the most explicit declaration of an intention to give, or of an actual present gift, yet, unless there is delivery, the intention is defeated. Several

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cases of this kind have been recently considered by this court. Young v. Young, 80 N. Y. 438," etc.

In the case at bar we have proof of the intentions of the deceased concerning the notes, but that is as far as the proof goes. There is no proof that the deceased ever gave or delivered these notes to the makers, or that he even told them that he had relinquished all right therein. Declarations that he never intended to require payment of the notes are not sufficient to constitute a gift without the delivery of the notes to the makers. To prove a gift the makers are required to show that the gift was complete with nothing left undone, with an actual delivery and acceptance of the notes, so that the donor parts with all right, title and interest therein. There was no delivery in this case; in fact, according to Mr. Lewis' testimony, there was a positive intention not to surrender up the notes. No presumption in favor of the contestants arises from the fact that the deceased had not attempted to collect these notes in his lifetime. In fact, it appears in the proof that he stated that he could not collect them.

Leaving out the question of the Statute of Limitations, I do not think there is any doubt but what the deceased could have recovered judgment on the notes if the sole defense consisted of declarations of his intentions as submitted upon this hearing, for, he could have changed his mind as to collecting them at any time, and these declarations would be no defense.

I cannot see that the dealings which the deceased had with his other children or compromises made with them can have any legal bearing upon this case. The question is, did or did not the deceased give these particular notes to the contestants in his lifetime. If he did, then they should be stricken from the account. If he did not, then they must be deducted from the shares of the makers in the estate. Contestants' counsel urges that the fact that the notes were not delivered has no force, for the reason that the notes were outlawed prior to the death of the deceased, and that the notes were no longer representative of present obligations and had no value, and that the delivery would have been idle ceremony. I cannot agree with this view however. The Statute of Limitations does not extinguish the debt, but merely bars an action thereon if it is pleaded. The debt remains, and the Statute of Limitations may be removed by payment being made upon the debt, and we have proof in the case (offered by con-

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testants) of $50 having been paid to the deceased in February, 1899, by Charles A. Timerson, and this payment, of course, must be deemed to have been paid upon the indebtedness represented by his notes.

In view of the above I think that the contestants have failed to prove either payment or a gift of the notes in question, and a decree may be entered dismissing the objections, and that the account be allowed as filed. Parties may move for further hearing upon notice.

Decreed accordingly.

Matter of the Estate of JOHN WALKER, Deceased.

(Surrogate's Court, Otsego County, January, 1903.)

Will — Contingent remainder — Division per stirpes.

A testator gave his residuary estate to his wife for life, thereafter to his sister Mary Stewart and his brother David Walker "who shall then be living, jointly, share and share alike forever", and, after the deaths of his wife and his sister, he gave it "to Chestine Stewart, Archibald Stewart and Mary Stewart, or the survivors of them, children of my said sister and to Robert Walker, David Walker, sons of my brother David Walker and Isabella and Christine and two other daughters of my said brother, whose name I cannot now recollect, jointly, share and share alike, or to the survivors of them". His wife is accounting as his executrix and is to receive a gross sum for her life interest. Mary Stewart and David Walker have died.

Held, that as they died before the wife they never took any interest in the estate.

That, subject to the said payment to the life tenant, the children of Mary Stewart, or the survivor of them, took, as representatives of their mother, one-half of the estate and that the children of David Walker took the other half.

PROCEEDING for the settlement of the accounts of Fanny A. Bullock, formerly Fanny A. Walker, as surviving executrix of the will of John Walker, late of the town of Maryland, Otsego county, N. Y., deceased.

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Oscar F. Lane, for Fanny A. Bullock, executrix, who also appears in person.

Lewis, Watkins & Titus, for Archibald Stewart.

Theodore Avery, for William D. Raymond, as special guardian for infants W. D. Raymond, Jr., Mary Elsie Raymond and Charlotte Blecken, and also for William D. Raymond, as general guardian of Mary Elsie Raymond and W. D. Raymond, Jr., infants, and also for Florence A. Blecken, as general guardian of Charlotte Blecken, an infant.

M. E. Baldwin, for Robert Walker, Isabella Kilpatrick, Christina Walker, Mary Walker, David Walker and Frances Contrell.

WILLIS, S. John Walker, a resident of the town of Maryland, Otsego county, N. Y., died in said town on the 16th day of November, 1870. At the time of his death he left a widow, Fanny Walker, a brother, David Walker, and a sister, Mary Stewart. He also left nine nephews and nieces named in the will, to-wit: Chestine (so called) Stewart, Archibald Stewart and Mary Stewart, Jr., the children of Mary Stewart, Sr., and also Robert Walker, Isabella B. Kilpatrick, Christina Walker, Mary Walker, David Walker and Frances Contrell, the last named six persons being the children of said David Walker. All of these last named nine persons were and are in equal degree of relationship to John Walker, deceased. Chestine Stewart died without issue about the year 1891; Mary Stewart, the sister of the deceased, died about the year 1899. Her daughter, Mary Stewart, named in the will, survived the testator, John Walker, but died before her mother, Mary Stewart, Sr., leaving certain minor children for whom a special guardian has been appointed on the accounting. These children are William D. Raymond, Mary Elsie Raymond and Charlotte Blecken. David Walker, the brother, died about the year 1892. Fanny Walker, now Fanny Bullock, the widow, is still living, but all the parties interested in said estate under said will have consented that the funds now in the hands of the said Fanny Bullock be distributed, she taking a gross sum for the value of her life interest therein, according to the Northampton tables.

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The will of said John Walker was duly admitted to probate in the Surrogate's Court of the county of Otsego, on the 9th day of January, 1871, and on that day letters testamentary were granted to Fanny A. Walker and David Walker. David Walker has since died. Fanny A. Walker, now Fanny A. Bullock, is the sole surviving executrix of said estate; she has filed in this court her accounts as such executrix for final judicial settlement.

The following is a copy of the will of the said John Walker: "Will: I John Walker of Maryland, Otsego County, N. Y. do make, declare and publish this my last will and testament as follows:

"*First:* I give as a legacy to Fanny Palmer, daughter of the late Lewis R. Palmer, deceased, a bond of the Camden and Amboy Rail Road Company, a corporation of the State of New Jersey, of the denomination of one thousand dollars, forever and I hereby authorize my executors hereinafter named, after my decease to deliver to her the same.

"*Second:* I give and bequeath as a legacy to Jerry Davis, who has faithfully attended me during my sickness, a mortgage given by David Johnson, and bond accompanying the same, conditioned for the payment of the sum of three hundred dollars and interest, forever.

"*Third:* I give and bequeath to my sister Mary Stewart, of Clinton, Oneida County, New York, the use and occupation and the rents, issues and profits of my brick house and lot upon which it stands located in the city of Hoboken, New Jersey, being Number 221 Bloomfield Street during the term of her natural life, and after her decease, I will, bequeath and beheth the same to her heirs who shall then be living and to the heirs of my brother David, who shall then be living, jointly forever.

"*Fourth:* The remainder and residue of my estate, both personal and real I give and bequeath to my wife Fanny Walker, during the term of her natural life, and after her decease, I give and bequeath the same to my said sister Mary Stewart and David Walker, who shall then be living, jointly, share and share alike forever.

"It is my intention to leave my said property, except the two first legacies as above, after the decease of my said sister Mary and my wife Fanny, to Chestine Stewart, Archibald Stewart and Mary Stewart, or the survivors of them, children of my said

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sister and to Robert Walker, David Walker, sons of my brother David Walker and Isabella and Christine and two other daughters of my said brother, whose name I cannot now recollect, jointly, share and share alike, or to the survivors of them.

"Lastly I hereby appoint and constitute my brother David Walker and my wife Fanny Walker executors of this my last will and testament.

"In Witness Whereof I have hereunto subscribed my name this 16th day of November 1870. JOHN WALKER."

The legacies provided for by the first and second subdivisions of the will have been paid.

Mary Stewart, mentioned in the third subdivision of the will, has died since the death of the testator, and the property mentioned in the said third subdivision has been disposed of by the courts of New Jersey, in which State the said property is located.

The only controversy in this proceeding is in regard to what persons by the provisions of the fourth subdivision of the will are entitled to receive the personal property now in the hands of the said executrix, the said Fanny Walker, now Fanny Bullock, having filed her consent to accept at this time a gross sum for the value of her life interest in said personal property and all the interested parties having consented that the said personal property now in the hands of said executrix be now distributed. Under such conditions it is, therefore, proper and necessary, for the purpose of determining this question, to consider the said question as though the said Fanny Walker was dead.

I think it is a fair construction of the language employed in the will that the testator intended to give the remainder to his sister, Mary Stewart, and his brother, David Walker, only in the event that they survived the widow, who was the life tenant. By the fourth subdivision of the will, the residue of the testator's estate, both personal and real, is bequeathed to his wife, Fanny Walker, during the term of her natural life, and "after her decease" the remainder is bequeathed to his sister, Mary Stewart, and his brother, David Walker, "who shall then be living, jointly, share and share alike, forever." The words "who shall then be living," would seem to have no meaning unless they referred to the decease of the life tenant. The provisions of the will above referred to, unless given such a construction, would be entirely inconsistent with the declared intention of the testator, as ex-

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pressed in the remainder of the fourth subdivision of the will, for the testator declares his intention to be, that after the decease of his sister, Mary Stewart, and his wife, Fanny Walker, that the estate shall go to certain nephews and nieces named in said fourth subdivision of the will; a provision wholly inconsistent with the theory that Mary Stewart and David Walker jointly took vested remainders upon the death of the testator. I think the testator intended the bequest to his sister, Mary Stewart, and his brother, David Walker, to be contingent upon the event that they should be living at the time of the death of the life tenant. They having both died before the life tenant I am of the opinion that they took no interest or estate under the provisions of said fourth subdivision of the will in any property, but that the said estate in the hands of the life tenant was, therefore, disposed of by the remaining provisions of said fourth subdivision. Carmichael v. Carmichael, 4 Keyes, 346; Patchen v. Patchen, 121 N. Y. 432; McGillis v. McGillis, 154 id. 532.

This brings us to the question as to whether the testator intended to separate his nephews and nieces into two classes, by designating the children of his sister, Mary Stewart, as one class, and the children of his brother, David Walker, as another class, and dividing such remainder equally between the two classes, or whether the testator intended that all the nephews and nieces or the survivors of those named in the will should share equally in such remainder.

In the determination of this question, reference should be had to the whole will to aid in ascertaining the intention of the testator. It would seem clear from the first paragraph of the fourth subdivision of the will, that the testator intended to divide his property equally between his brother and sister, if they were living at the time of the death of the life tenant. There is nothing in the second paragraph of said fourth subdivision, as I view it, that expressly or by necessary implication changes the testator's purpose of dividing his property into two equal parts. He names the three children of his sister, Mary Stewart, or the survivors of them, and the children of his brother, David Walker, or the survivors of them, as the persons entitled to the property in case the bequests in the first paragraph of the fourth subdivision of the will fail by reason of the death of his sister and brother before the death of the life tenant. Why use the

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words "or the survivors of them," after the names of the three children of Mary Stewart unless it was for the purpose of designating those three legatees, or the survivor of them as one class, taking the share he had intended for their mother under the first paragraph of the said fourth subdivision, in case she had survived the life tenant? The very same words of survivorship are used after the names of David's children, and if the children of the brother and sister were intended to take the estate *per capita* the words of survivorship following the names of Mary's three children were wholly unnecessary, and would have no meaning. Assuming, however, the intention of the testator to have been to give to the children of his sister, Mary, the share he had intended for their mother, then the words "or the survivors of them" would be very appropriate to express his intention to give Mary's three children or the survivors of them, as the representatives of their mother, the share she would have taken had she survived the life tenant, and would be in harmony with the intention of the testator, as previously clearly expressed in subdivision three and in the first paragraph of subdivision four of the will. I think that Archibald Stewart, as the sole survivor of the three children of Mary Stewart, is entitled to one-half of the personal property bequeathed by subdivision four of the will, after deducting therefrom the value of the interest of the life tenant. Clark v. Lynch, 46 Barb. 68; Ferrer v. Pyne, 81 N. Y. 281; Vincent v. Newhouse, 83 id. 505.

While it may be regarded as the general rule that when the subject of the testamentary gift is to be "equally divided," the persons among whom the division is to be made would take *per capita*, yet it is equally well settled that this rule does not apply where a contrary intention is discoverable in the will. Bisson v. West Shore R. R. Co., 143 N. Y. 125.

It is also a general rule that where a gift is made to a person described as standing in a certain relation to the testator and to the children of another person standing in the same relation, as to my brother A. and to the children of my brother B., A. only takes a share equal to one of the children of B., yet this rule is subject to many exceptions and is never enforced where a contrary intention can be gathered from the language of the will. The rule is said to yield "to a very faint glimpse of a different intention." Ferrier v. Pyne, and other cases cited above.

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I think it is sufficiently plain in the case at bar that the testator had a contrary intention and that he did not intend that the children of David should take more than the share that the testator had intended to give their father in case he had survived the life tenant.

The property to be distributed in this proceeding being personal property, the words of survivorship would seem to refer to the period fixed for the division, viz., the death of the life tenant, and not to the time of the death of the testator. Teed v. Morton, 60 N. Y. 502.

Chestine Stewart and Mary Stewart, Jr., having died after the testator and before the life tenant, it would follow, therefore, that after the deduction of the interest of the life tenant in the personal property to be distributed in this proceeding, that Archibald Stewart, as the sole survivor of the three children of Mary Stewart, Sr., is entitled to one-half of the remainder of said personal property, and the six children of David Walker are entitled to the other one-half of the remainder of the said personal property, to be divided equally between them.

Findings and conclusions may be prepared in accordance with the above.

The decree may be entered accordingly.

Decreed accordingly.

Matter of the Estate of CLARISSA WILMOT, Deceased.

(Surrogate's Court, Otsego County, January, 1903.)

Administration — Delayed claims — Jurisdiction on the hearing of a disputed claim — Claim for a conversion.

Claims withheld during the life of an alleged debtor and sought to be enforced after his death should always be scrutinized closely and be admitted only upon very satisfactory proof.

Upon a reference of a disputed claim the surrogate has no power to render against a claimant, upon a counterclaim in favor of the estate, an affirmative judgment in excess of the counterclaim.

Before the estate of a widow, since deceased, given by her husband's will the right to use his estate to support herself and his

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sisters, can be charged with moneys of that estate which it is alleged that she converted or misappropriated, the fact of the conversion or misappropriation must be affirmatively shown.

PROCEEDINGS upon the final judicial settlement of the accounts of Julia A. Moore, as administratrix with the will annexed of said Clarissa Wilmot, deceased.

R. M. Townsend, for administratrix with will annexed.

C. C. Flaesch (M. E. Baldwin, of counsel), for Alice Orcutt, an alleged creditor, individually, and also an alleged creditor as administratrix with will annexed of Daniel W. Wilmot, deceased.

WILLIS, S. There is a controversy in this proceeding in regard to two claims which have been presented against this estate. One claim is presented by Alice Orcutt, and the other claim is presented by Alice Orcutt as administratrix with the will annexed of Daniel W. Wilmot, deceased.

Both claims were rejected by the representative of this estate, and are now before the court in pursuance of a consent and stipulation that the surrogate hear and determine said claims in this proceeding.

The alleged claim presented by Alice Orcutt consists of the following items: "Board of the decedent, money paid by the claimant during the life time of the decedent for repairs in and about the house of the decedent, debts owing by the decedent and paid by the claimant during decedent's life time, care of Emeline Wilmot and Louisa Hanford for whose care and support it is alleged that decedent was liable."

A careful examination of the evidence in this proceeding fails to convince me that the said claim presented by the said Alice Orcutt is a just and proper claim against this estate. The principal part of this alleged claim arose in the year 1895. I believe from the evidence presented herein that if any claim ever existed against the decedent and in favor of the claimant for the items mentioned in her said claim, it was paid by or out of the large sums of money received by the claimant in the year 1895, from North & Co.'s Bank, being the proceeds of certain certificates of deposit belonging to the decedent. I think this is a fair presumption from all of the evidence in the case. 99 N. Y. 75.

Upon a consideration of all the evidence in this proceeding I

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do not think that this alleged claim has been brought within the rule which has been uniformly enforced by the courts: "That claims withheld during the life of an alleged debtor and sought to be enforced after his death are always to be carefully scrutinized, and admitted only upon very satisfactory proof." 85 N. Y. 139; 17 N. Y. Supp. 723; 140 N. Y. 633; 75 Hun, 4; 85 id. 487; 91 id. 89; 1 App. Div. 184; 20 id. 121; 28 Misc. Rep. 338.

The claim is, therefore, disallowed.

The question of alleged rent of the house on Clifton street occupied by the claimant Alice Orcutt, is not considered in this proceeding. The disallowance of said claim making a consideration of the question of alleged rent entirely unnecessary and improper, as no affirmative judgment against this claimant and in favor of the representative of this estate could be rendered by this court in this proceeding. 88 N. Y. 453; 45 Hun, 403; 46 id. 71.

The other claim is presented by Alice Orcutt as administratrix with the will annexed of Daniel W. Wilmot, deceased, and is for moneys alleged to belong to the estate of Daniel W. Wilmot, and alleged to have been wrongfully converted by his widow, Clarissa Wilmot, in her lifetime by taking and misappropriating a part of the principal of the estate of said Daniel W. Wilmot.

By the provisions of the will of Daniel W. Wilmot, the said Clarissa Wilmot is given the income absolutely of his property during her life, with the right to use the whole or any part of the principal for the support of herself and the testator's two sisters, Louisa Hanford and Emeline Wilmot.

Upon the hearing, a check, purporting to have been drawn by D. P. Loomis, upon North & Co., Bankers, to the order of Clarissa Wilmot, as executrix of the last will and testament of Daniel W. Wilmot, and bearing her indorsement, together with that of the claimant Alice Orcutt, with stamp of the bank thereon, showing its payment, was read in evidence by the claimant. There is no evidence to show upon what fund this check was drawn or whether it represented principal or income belonging to the estate of Daniel W. Wilmot. I think the loose declarations as to the wish or necessity of Clarissa Wilmot for moneys alleged to be in the hands of Loomis with which to pay the claims for alleged repairs on her property are insufficient to show that this check represented a portion of the principal of the estate of Daniel W. Wilmot. The amount or the character of the principal of the estate of Daniel W. Wilmot is not shown, nor is it made

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to appear as to what income was earned by the estate, or what was at the time of the giving of said check due to the said life tenant. Therefore, so far as anything appears in this proceeding, the check might have represented income to which the said Clarissa Wilmot was entitled absolutely under the will. If any presumption is to be indulged in, it would be that she lawfully received the money as income and lawfully expended it, or even if the check represented principal of the estate of Daniel W. Wilmot, that it was used by her for the purposes authorized by the will. There is no evidence upon which a finding could be based, that any part of the proceeds of this check was applied in payment of these alleged repairs.

I am of the opinion, that under the rule as laid down in the cases heretofore cited, that very satisfactory proof of this alleged claim should be produced before the claim is admitted or allowed. See cases heretofore cited.

I think, also, that the fact of the conversion or misapplication must be affirmatively shown before the claim could be allowed against this estate. Matter of Mason, 4 Edw. Ch. m. p. 418.

It seems to me that there is an entire failure of such proof in this proceeding in reference to this claim.

The claim is, therefore, disallowed.

The question as to costs and the provisions of the decree may be settled before the Surrogate.

Decreed accordingly.

Matter of the Application of BYRON R. BREWSTER for an Order Revoking and Cancelling Liquor Tax Certificate No. 28,566 Issued to FRANK L. HILLMAN.

(County Court, Essex County, January, 1903.)

Liquor Tax Law — "Hotel" — Changes in the building — Abandonment — Innocent and immaterial statement as to continuous occupation.

A place, kept open for entertaining strangers or travelers and which receives all who come to it, without any previous agreement as to length of stay or terms of entertainment, is a "hotel" within the Liquor Tax Law.

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To be a "hotel" it need not keep a safe for valuables or have a register for guests or provide stable accommodations.

The fact that it displays a sign "Boarding house" is not controlling as to its character.

A building occupied exclusively as a hotel on March 23, 1896, does not lose its privilege or change its identity merely because after said date the location, in it, of the barroom has been changed.

A hotel cannot be deemed to have been "continuously occupied" as such since March 23, 1896, where it appears that since that date a considerable portion of it has at various times been rented to tenants and used for other purposes.

A liquor tax certificate cannot lawfully be revoked merely because a person, applying for it for premises which were occupied exclusively as a hotel on March 23, 1896, innocently and in good faith made in his application the misstatement that the premises had since been continuously occupied as a hotel.

Such a statement is, in such case, not material or necessary.

APPLICATION for an order revoking and cancelling a liquor tax certificate.

Francis A. Smith, for petitioner.

Adelbert W. Bynton, for Hillman.

KELLOGG, R. C., J. It is alleged in the petition that the liquor tax certificate was issued to said Frank L. Hillman upon his written application duly verified, stating among other things:

First. That the said premises were actually occupied as a hotel on March 23, 1896.

Second. That for the past nine or ten years the said premises had been continuously occupied as a hotel.

Third. That the said Hillman might lawfully carry on such liquor traffic upon said premises and was not within any of the prohibitions of the law.

Fourth. That the statements so made by Hillman were material statements and were false. That the said premises are within two hundred feet of the nearest entrance of buildings occupied exclusively as dwellings.

The defendant, answering the said petition, admits the granting

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of the said certificate and the statements on which the same was granted; that he has trafficked in liquors thereunder as alleged and denies upon information and belief each and every other allegation in said petition contained, and alleges that said certificate was lawfully issued, and that each and every condition necessary for the issuing thereof existed; that he is informed and believes the said premises were on the 23d day of March, 1896, actually occupied as a hotel; and that he was under none of the prohibitions of the Liquor Tax Law (Laws of 1896, chap. 112).

These issues upon an order to show cause were sent to a referee to take and report the evidence to the court. The referee has filed his report and the proceeding is now before me, under the practice prescribed in subdivision 2 of section 28 of the Liquor Tax Law, for an order revoking the said liquor tax certificate.

Were the premises actually occupied as a hotel March 23, 1896, when the Liquor Tax Law became operative, and were they continuously occupied as a hotel thereafter and until the liquor tax certificate was issued to Hillman? If they were, the applicant is entitled to the certificate, and it is immaterial whether or not the liquors were sold upon the premises. This brings us to the question, what is a legally constituted hotel. The terms "Inn" and "Tavern" as used in the statute regulating taverns, etc., are synonymous. Overseers, etc., Crown Point v. Warner, 3 Hill, 150. The legal definition of an inn is the same as what is understood in this country by a hotel. An inn or hotel is a house where all who conduct themselves properly and who are able and ready to pay for their entertainment are received, if there is accommodation for them, or who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodgings and such services and attention as are necessarily incident to the use of the house as a temporary home. Cromwell v. Stephens, 3 Abb. Pr. (N. S.) 26. This is the same definition applied to the term "hotel" by the Liquor Tax Law, section 31, with the added words, "and in which the only other dwellers shall be the family and servants of the hotel keeper; and which shall conform to the following requirements if situated in a city, incorporated village of twelve hundred or more * * * inhabitants. 1. The laws, ordinances, rules and regulations relating to hotels and hotel keepers * * * shall

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be fully complied with." The petitioner claims that the omission to keep a register and to post notices as to deposit of valuables and the failure to have stable accommodations go to show that the premises were not run as a hotel. To so hold would be a technical and strained construction of the law, as many places which are recognized in the country as hotels do not have a safe, register or stable; besides the statute requiring the posting of notices was enacted for the protection of the hotel keepers and to limit his liability and not as a requirement necessary towards the establishing of a hotel. It is not necessary that the house be kept only for the reception of travelers. It is not necessary to constitute a hotel that it shall conform to the requiremeents of subdivision 1 of section 19 of chapter 401 of Laws of 1892, or of section 31, chapter 112 of Laws of 1896. It was a hotel in the contemplation of the Liquor Tax Law if it was kept open for entertaining strangers or travelers. Matter of Moulton v. Acconcia, 59 App. Div. 27. See also Liquor Tax Law (L. 1901, ch. 640, § 7). It is sufficient that all who come to the house without any previous agreement as to duration of their stay or terms of their entertainment are received as guests. Taylor v. Monnot, 4 Duer, 116; Wintermute v. Clarke, 5 Sandf. 242.

Charles H. Cummings, the owner of the premises, swears he was in sole occupancy of the premises from 1893 and until April 1, 1896; that during that time he entertained guests there for hire, received the traveling public generally, any one who came, either for single meals, lodging or board. "I put the building up for a boarding-house or public house to keep people. I used it for no other purpose, sold some groceries and dry goods. Had no office only the newsroom used for men to wash and sit in. It was a hotel except we did not sell any whiskey. I put up sign 'Boarding House' and kept boarders." This witness was asked "Then don't you honestly think that your house was not a hotel but a boarding-house." He answered: "Not more than lots of other hotels. I can't see any difference between that house as it was run and a hotel that doesn't sell drinks. I put up the sign 'Boarding House' so that people could know that people could come in there and be taken for a week, or meals, or lodging." The respondent offered in evidence a paper given by this witness to Hillman to be used on the application for a liquor tax certificate and sworn to, May 12, 1892, by the witness stating that prior to March 23,

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1896, he was and had been for about four years the owner and proprietor of the hotel on Commings Corner in Main street in said village known as "Commings Hotel" or "Commings House" and that the building had been continuously occupied as a hotel since that time. The witness swore that these statements made by him were true. Sarah Commings, the wife of the said Charles H. Commings, swore that they furnished meals and lodgings to any one that came and applied; that the house was open to all such at any time. We called it the "Commings Boarding House." The designation "Boarding House" or "Hotel" by witnesses is not controlling or material. See Matter of Rasquin, 37 Misc. Rep. 693.

Was this a hotel March 23, 1896? Although the accommodations for the guests of the house were limited and not such as are ordinarily expected at a hotel, I think the contention of the respondent that the premises were occupied as a hotel on March 23, 1896, has been established. In so far as this point is concerned, the application must be denied.

This brings us to the consideration of the second contention, that the premises have been continuously occupied as a hotel since the 23d day of March, 1896.

The petitioner claims that the building occupied by Commings was not the same building that Hillman purchased and claims, therefore, it could not have been continuously occupied as a hotel.

The evidence on this point is that the house was enlarged, by putting the barber shop in the basement and an addition on the rear, the barber shop now being the barroom. The basement was a part of the building in March 23, 1896, but was not finished off into a room. Does finishing this basement into a room and using it as a barroom change the building as contemplated by the Liquor Tax Law? If this be true then a person keeping a hotel cannot move his bar from one part of the building to a room in another part. The petitioner cites Matter of Haight, 33 Misc. Rep. 544, as supporting his contention. That was a case where an entirely different and separate building was purchased and connected with the old building by building between, and the application was for the privilege of selling liquor in the "New Building." The court held that the "building purchased was not entitled to the privilege existing in favor of the hotel property." The law unquestion-

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ably intended that the certificates should be confined strictly to the premises to which they were applicable, and not to such premises as might, in the future, be connected with the original premises, but did it intend that it should not apply to the original premises, that were entitled to the exemption, simply because the basement was made into a barroom. I think not. In Matter of Moulton, 59 App. Div. 29, the court by inference sustains this position. This case was affirmed in 168 N. Y. 645.

The petitioner further contends that if the place in question was a hotel at the time the Liquor Tax Law was passed, it was abandoned as such and the exception in the statute relieving Hillman from the necessity of procuring the consents of residents does not apply here. It was held in Matter of Kessler, 163 N. Y. 208, that: "In order to deprive the place of the privilege conferred by the statute it must appear that there was a real and substantial abandonment of the business by the occupant.

"When that is shown it will terminate the privilege, even though the suspension should be for but a brief period. But where the occupant is compelled to suspend for a brief period by stress of circumstances, or from an accident, * * * the right will not be lost, providing the business is resumed at the first reasonable opportunity." The plain purpose of the law was, that when the business in such places has been once abandoned, it should not be resumed except with the consent of the residents. In Matter of Hawkins, 165 N. Y. 192, the court held that: "The privilege is not attached to the property in perpetuity, and is not a thing that necessarily and under all circumstances runs with the land. It may be lost by abandonment, or nonuser, when the facts and circumstances are such as to justify the conclusion that the owner intended to discontinue the liquor traffic at the place. When that intention is clearly established the period of time during which the place is vacant, or used for other purposes, is not very material." And further where the statements made are immaterial, although technically false, they are not false within the meaning of the statute.

Having decided that the place was a hotel March 23, 1896, the only remaining question for us to consider is has it been, within the meaning of the statute, continuously occupied as a hotel since. The petitioner contends that it has not been run as a hotel but as a boarding-house, while the respondent claims the

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reverse. The evidence shows that a large majority of the people staying at the house were persons who stayed there for a longer time than one day and paid for their accommodations by the week if they stayed one week or longer or at a stipulated price per week. On the other hand the evidence shows that any one who came there and asked for lodging and meals was received and entertained, paying twenty-five cents per meal and the same sum for lodging, and each witness, who had kept the house since March 23, 1896, testified that they always kept any person who came there and asked for meals and lodgings, if they had the accommodations. Merely fixing the price to be paid does not make the person a boarder rather than a guest. Hancock v. Rand, 94 N. Y. 10, and cases cited. See also Metzger v. Schnabel, 23 Misc. Rep. 699. There are numerous decisions holding that, even where there is a special agreement as to time and price, it does not absolutely disturb the relationship of innkeeper and guest, although it seems to be well settled that a guest, as distinguished from a boarder, is bound for no stipulated time and stops for as long or short time as he pleases, paying, while he remains, the customary charge; still a person may pay by the week at a hotel and not change the character of the house to a boarding-house. So far as the question of entertaining people is concerned, I think the evidence sustains a finding that the place has been run as a hotel within the fair meaning of the law. On the other hand the evidence shows that some parts of this building were used for other purposes since Commings gave up running the house, rooms were rented and occupied by a dressmaker, who kept house in the rooms she occupied and other similar occurrences; in one instance leaving only five rooms for guests. Without going further into a discussion of the evidence taken before the referee but, after a thorough and careful examination of all of the evidence, it seems to me that under the evidence presented I must hold that the respondent has failed to establish his contention that the premises have been continuously occupied as a hotel within the meaning of the Liquor Tax Law, since the passage of that law, March 23, 1896.

The respondent Hillman claims that, as he acted in good faith, the statement as to the continuous occupancy of the hotel is immaterial and the application must be dismissed. The prohibition contained in section 24, subdivision 2, of the Liquor Tax Law.

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provides that the prohibition therein shall not apply to a place which, on the 23d day of March, 1896, was lawfully occupied as a hotel. Section 17, subdivision 8, of the same law, provides for filing the certificates in a case where the premises are within the prescribed limits except that such consent shall not be required for any place described in said statement which was occupied as a hotel March 23, 1896, notwithstanding the traffic in liquors was not carried on thereat. The Court of Appeals in considering a similar case (165 N. Y. 191), said: "The statement in the application upon which the order was based, even if untrue, was wholly immaterial, and an order revoking a license for a false statement cannot be predicated upon such a representation. There was power under the law to issue the certificate, whether the business had been continuously carried on at the place in question or not after the enactment of the present law. The statute does not require the use of the premises for the purpose of the traffic to be continuous. The word 'continuous' does not apply to that provision of the statute, or to the exception therein in favor of places like this."

I do not see why the same principle will not apply to a place occupied as a hotel March 23, 1896, although no liquor was sold. Again at page 192 the court says: "Nor is it necessary to produce the consents required by subdivision 8 of section 17. All that is necessary to state in order to relieve the applicant from the necessity of filing consents is that the traffic was actually and lawfully carried on upon the premises March 23, 1896. The word 'continuously' which is used in the same subdivision, refers to a case where consents are necessary for other places, and having been once obtained and filed, are preserved and kept in force so long as the place shall be continuously occupied for the traffic. Inasmuch as no consents were necessary and the place in question was expressly excepted from the provisions of the law which required consents to be filed, the statement in the application, whether true or false, was utterly immaterial. In Matter of Kessler, 163 N. Y. 205, this question was not raised or passed upon. It was assumed by both parties in that case that it was necessary under the statute that the traffic should be continuous in order to entitle the applicant, who had not procured the consents prescribed, to the certificate. Clearly it is not, as will be seen by a careful reading of the statute. All that was decided

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in that case was that, under the facts and circumstances disclosed, the traffic was continuous within the fair meaning of the statute." It was also held in the Kessler case that: "The false statements in an application for a certificate which will justify its revocation under the statute must relate to some material matter of fact, and it must be shown that such fact was willfully misstated by the applicant."

There is nothing in this case to show the statements made by Hillman were willfully false. The evidence shows that in Hillman's application for a liquor tax certificate, his grantor made a statement under oath, "that prior to March 23, 1896, he was and had been for about four years the owner and proprietor of the hotel on Commings' Corner in Main street, known as Commings' Hotel or the Commings' House, and that said building had been continuously occupied as a hotel since that time." Hillman swore he never was inside of the house until he bargained for it, some few months before he made his application for the certificate. If I correctly construe the meaning of the court in 163 and 165 New York, *supra,* the principle applied in 163 New York is the same as the case under consideration excepting that the court held in that case that the premises had been continuously occupied as a hotel, while in this case I hold they had not been. We find ourselves confronted with the decision of the Appellate Division, holding that the question of good faith is immaterial, and the Court of Appeals, deciding that it must be shown that the facts were willfully misstated. If it must be shown that the facts were willfully misstated then certainly the question of good faith is material, and the evidence, failing to show that the statements of Hillman were willfully misstated and on the contrary showing that he acted in good faith, it seems to me that, under the decisions of the Court of Appeals, the application to revoke and cancel the said certificate must be denied.

Application denied with costs.

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Matter of the Petition of FRED. L. RYON, for an Order Revoking and Cancelling Liquor Tax Certificate No. 30,326, issued to JOHN P. AUCHMOODY.

(County Court, Ulster County, January, 1903.)

Liquor Tax Law — Bedrooms of a hotel too small — Dwelling erected to defeat the granting of a certificate.

A liquor tax certificate, for a hotel, must be revoked where it appears that at the time when the holder applied for the certificate some of the bedrooms of his hotel did not comply with the requirements of the Liquor Tax Law in regard to floor area and cubic feet of space and were of less area and space than required by the statute.

A small house, erected with intent to defeat the granting of a liquor tax certificate but rented and occupied by a man and his wife as a home, is a building "occupied exclusively for a dwelling" within the meaning of the statute, and, where the house is within two hundred feet of the hotel, the licensee's statement, in his application, that there is no dwelling within two hundred feet of the hotel is material and is false.

APPLICATION for an order revoking and cancelling a liquor tax certificate.

George Davis (Chas. F. Cantine, of counsel), for petitioner.

Brinnier & Searing, for John P. Auchmoody.

VAN ETTEN, J. This is an application for the revocation of liquor tax certificate, issued to John P. Auchmoody, because of alleged false statements in the application for such certificate.

Application was made for a license known as a hotel license, and in such case the Liquor Tax Law provides that a building, used as a hotel and located as is the one in question, shall contain at least six bedrooms, each of which shall have at *least* eighty square feet of floor area and shall have at *least* 600 cubic feet of space therein. The bedrooms in the hotel of Auch-

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moody did not answer the requirements of the Liquor Tax Law, and contained a less number of cubic feet than the law required.

The floor area of some of the bedrooms was only about fifty-four square feet and they contained only about 384 cubic feet of space therein.

Where the Legislature has required that a hotel shall have rooms containing at least eighty square feet of floor area, the court has no power to say that a room, containing seventy, sixty, or fifty-four square feet, or less, will answer the requirements of the statute.

I think the provision of the statute mandatory. If it had appeared in the application that the rooms in question were not of the sizes required by law, a certificate would undoubtedly have been refused. Where it appears, after a license has been granted, that the law has not been complied with, the certificate should be revoked.

It was held in Matter of Barnard, 48 App. Div. 424, that the court must decide the matter as of the time when the application was made, and, if a false statement was made in the application, it is then the duty of the court to revoke the license.

Immediately prior to the granting of this license a small house was erected, which, since May 4, 1902, has been used and occupied as a dwelling and home by Abram Hornbeck and wife, and they have paid rent for it. Although it appears that the building was erected with the avowed purpose and intent of defeating the granting of the liquor certificate in question, yet, where the dwelling is actually used as a dwelling and home by a man and wife, it comes within the provisions of the Liquor Tax Law. This building is located within 200 feet of the building used and occupied by Auchmoody as a hotel, and the application for the certificate contained false statements as to there being no dwelling within 200 feet.

For these reasons the application of the petitioner is granted, with $25 costs.

Application granted, with $25 costs.

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The People ex rel. FANNIE FORSTER, Relator, v. THE WARDEN OF THE KINGS COUNTY PENITENTIARY et al., Respondents.

(Supreme Court, Kings Special Term, February, 1903.)

New York city — Misdemeanor — Loitering in a city thoroughfare for the purposes of prostitution.

The offense (L. 1882, ch. 410, § 1458) of loitering or being in any thoroughfare or public place of the city of New York for the purposes of prostitution or solicitation is a misdemeanor and as such is beyond the jurisdiction of a city magistrate and triable only by courts of special sessions.

This specific misdemeanor is to be distinguished from the offenses of vagrancy, or of being a disorderly person.

A city magistrate's commitment of a woman, charged with this misdemeanor, to imprisonment in the county penitentiary, after he has found her "guilty of such disorderly conduct as in my (his) opinion tends to a breach of the peace", cannot be justified under the Consolidation Act or the existing charter of the city and is void in any view.

HEARING on a demurrer to the returns to writs of habeas corpus and certiorari.

Luke O'Reilly for relator.

Martin W. Littleton for respondents.

GAYNOR, J.: The relator was tried and convicted by a city magistrate in the borough of Brooklyn, and sentenced to a term of imprisonment of six months in the Kings county penitentiary. She seeks to be released by writs of habeas corpus and certiorari.

The complaint against her was that she was "a common prostitute and night walker, and that she was on the night of the 20th of January, 1903, in the borough of Brooklyn, City of New York, and county of Kings, loitering in Hudson avenue near De Kalb avenue, that being a public thoroughfare and public place, soliciting and importuning men passing in and along said thoroughfare or place, for the purpose of prostitution, to the great annoyance of the people of the state", etc.

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She was found "guilty of such disorderly conduct as in my opinion tends to a breach of the peace", as the commitment recites, instead of being in terms convicted of the offense charged. That the terms of the commitment are not broad enough to embrace the offense charged will appear from the examination of statutes which follows, though the decision will be placed on a broader ground.

If the information against the relator charged her with a misdemeanor, then the magistrate had no jurisdiction to try her, and her conviction would for that reason be void. Exclusive jurisdiction to try all charges of misdemeanors in the city of New York belongs to the courts of special sessions and not to magistrates (L. 1901, ch. 466, § 1409; People ex rel. Frank v. Keeper, 38 Misc. Rep. 233; People ex rel. Clark v. State Reformatory, id. 241; People ex rel. Smith v. State Reformatory, id. 243; People v. Patterson, id. 79; Kolzem v. Broadway & Seventh Ave. R. R. Co., 1 Misc. Rep. 148, 48 N. Y. St. Repr. 656).

The learned counsel for the magistrate claims that the information was drawn under subdivision 2 of section 1458 of the charter of the old city of New York (L. 1882, ch. 410); and that is obviously so, for it follows the phraseology thereof. The said section and others of kin to it are presumed to be kept in life by section 1610 of the present city charter.

By the said subdivision, and the first part of the section, "Every common prostitute or night walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation, to the annoyance of the inhabitants or passers-by", "shall be deemed guilty of disorderly conduct that tends to a breach of the peace." By the first subdivision any one who suffers an unmuzzled ferocious or vicious dog to go at large, and by the third any one who uses threatening, abusive or insulting behavior with intent to provoke a breach of the peace, shall be deemed guilty of the same offense, viz., of "disorderly conduct that tends to a breach of the peace."

It is to be observed that the offense defined in subdivision 2 is not of being a common prostitute; it is of loitering or being in a public street or place for the purpose of prostitution or solicitation, which is called disorderly conduct that tends to a breach of the peace; and this was the only charge that was or could be made against the relator under the said subdivision. She could not be

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charged or convicted under it merely of being a common prostitute; the offense there defined is not that, but an offense against decency which could be committed only *in the public street.*

This section 1458 does not prescribe any penalty for the offenses it creates. They are therefore left subject to the general penalty prescribed for misdemeanors for which no special penalty is prescribed, if they be misdemeanors.

And I see no ground for holding them not to be misdemeanors, but only of that class of statutory offenses which are less than criminal offenses — not classed as crimes at all — and which are therefore not required to be dealt with according to the course of the common law, but may be dealt with summarily. The offenses of that class are defined, and the way of dealing with them prescribed, in the ancient statutes which are preserved in sections 887 and 899 of the Code of Criminal Procedure. Persons convicted thereunder are not convicted of any crime, and may therefore in addition be tried and convicted of the acts for which they are summarily dealt with when such acts constitute crimes (People ex rel. Van Houton v. Sadler, 97 N. Y. 146). The antiquity of these two statutes is probably all that saves them from the taint of unconstitutionality, as is familiar to those who have looked into the literature of that subject. At all events, certain it is that no such summary jurisdiction can exist unless specifically conferred by statute. It cannot be presumed; on the contrary, when an offense is created, the presumption is that it is one to be dealt with according to the regular and safe course of the common law.

The next section in the said old charter (§ 1459) only provides that whenever it shall appear on oath to a magistrate that any person has been guilty of "any such disorderly conduct as in the opinion of such magistrate tends to a breach of the peace, the said magistrate may cause the person so complained of to be brought before him to answer the said charge."

These two sections were taken into the compilation of laws which constituted the said charter from an independent statute which formed no part of the charter of the city of New York, viz., from chapter 508 of the Laws of 1860. They appear there together (§§ 20, 21), and contain all there is in the said act on the subjects which they embrace. The latter section does not embrace or refer to the offenses defined in the former. It embraces

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any such disorderly conduct as "in the opinion of such magistrate" tends to a breach of the peace; whereas the former section embraces only three offenses, which it specifically defines and declares to tend to breaches of the peace, and does not leave to depend on the opinion of the magistrate as to whether they tend to a breach of the peace. The latter section contemplates any conduct which tends to a breach of the peace, which by common law, and later by statute, has always been a misdemeanor. It says such "disorderly" conduct as tends to a breach of the peace; but that word is tautological, for any conduct tending to a breach of the peace is disorderly.

Neither of these two sections prescribes any procedure or punishment for the offenses it embraces, nor does any other part of the said act of 1860. It seems therefore incontestible that the three offenses in the former section, and which were created by the said act of 1860, were and are misdemeanors. They were simply taken into the said charter compilation just as they were.

There is another section of the said old charter which mentions "disorderly conduct" which, "in the opinion" of the magistrate, tends to a breach of the peace, viz., 1461. It provides that in all complaints therefor before a magistrate, he may require the offender to give sureties for his good behavior for not to exceed twelve months. This is taken from another old statute, viz., chapter 11 of the Laws of 1833, and also plainly refers to conduct tending to a breach of the peace at common law or by statute. The provision stands entirely alone in the said act of 1833. Another section, viz., 1562, provides that in all cases of arrest for "disorderly conduct", police justices may, in addition to holding the offender in sureties for good behavior, fine him not to exceed ten dollars, and in default of payment thereof to commit him to prison to serve one day for each dollar. This was first enacted in chapter 491 of the Laws of 1859, and stands alone there. Its plain purpose was to supplement the said provision of the act of 1833, by prescribing a fine or imprisonment in addition to holding the offender to keep the peace, in the discretion of the magistrate. The prescribing of a fine, or imprisonment, also shows the offense to be a misdemeanor.

The foregoing comprise, I believe, all of the provisions in the said old charter, and in the old statutes of which it is made up, which use the phrase "disorderly conduct"; except section 1448

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of the said charter, which is taken from the said act of 1833, and provides that any one who shall drive or ride a horse at a greater speed than five miles an hour, shall be deemed guilty of "disorderly conduct", and fined ten dollars or less, and committed one day for each dollar in default of payment. Here only, and in defining this one offense, the phrase is used pure and simple, without any addition or qualification. The other provisions only embrace or refer to *disorderly conduct tending to a breach of the peace.* Nevertheless persons have been in the past constantly convicted and imprisoned under the vague and naked charge of "disorderly conduct" for divers commissions or omissions which no law defines as crimes. The phrase has been made to mean anything a policeman or police justice saw fit. There can be no criminal acts which are not defined by law, and the legislature cannot delegate to magistrates or courts the power of creating criminal offenses. The phrase "conduct (or disorderly conduct) tending to a breach of the peace" is restrictive. It embraces only offenses against the public peace, and its meaning has always been well defined and understood. The phrase "disorderly persons" occurs in sections of the said old charter and statutes, but it must not be confounded with the other phrase. It has a well defined meaning therein, and has long had in our general statutes (Code Crim. Pro., § 899).

Nor does section 707 of the present charter help the magistrate out. It must be first observed that it does not profess to, and does not create or define any new offenses. It only professes to direct what shall be done with persons convicted of certain existing offenses which it names.

It provides that "Whenever any person is convicted in The City of New York as constituted by this act, of public intoxication, disorderly conduct or vagrancy, the court or magistrate, before which or whom such conviction is had", shall impose certain penalties, if sentence be not suspended, viz.: "Upon a charge of vagrancy if the person so convicted be a prostitute between the ages of sixteen and twenty-one", the commitment shall be for not exceeding one year to certain reformatories which are named. And the provision then continues: "All other persons convicted upon a charge of vagrancy, including persons convicted as prostitutes and not committed to a reformatory, shall be committed * * * in the borough of Brooklyn to the penitentiary of said borough

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* * * for the term of six months." The words "including persons convicted as prostitutes and not committed to a reformatory", plainly refer to convictions of prostitutes as vagrants, as mentioned in the preceding part.

The relator was not accused, tried or convicted of being a vagrant (which term includes certain common prostitutes, as will be more fully shown immediately hereafter), and could not therefore be sentenced under this section as a vagrant. Section 1464 of the said old charter defines and classifies "common prostitutes who have no lawful employment whereby to maintain themselves" as vagrants; and section 887 of the Code of Criminal Procedure, which defines who are vagrants, also includes common prostitutes and contains the very same definition in respect of them, viz., "A common prostitute who has no lawful employment whereby to maintain herself" (sub. 4); and the term "vagrancy" as used in the said section 707 has to be referred to these provisions for its meaning. It will be observed that all prostitutes are not vagrants, but only such as have no lawful employment to maintain themselves. No such charge was made against the relator, but the very different and restricted charge created by the said section 1458 of the old charter, viz., that she was in a public street "for the purpose of prostitution or solicitation", which is the offense created by that section, regardless of whether the person has any lawful employment to support herself, and can only be committed in the public street.

The three offenses mentioned by the said section 707 are, as we have seen, "public intoxication, disorderly conduct or vagrancy". Having shown that the relator was not charged with or committed for vagrancy (which includes certain common prostitutes, as we have seen), and there being no charge of intoxication, it only remains to consider the phrase "disorderly conduct" as used in the said section, and to see if it applies to the relator's case; for that section permits persons convicted of "disorderly conduct" to be imprisoned for six months in the penitentiary by the "court or magistrate".

In the first place, it is quite obvious that this crude section 707, and the cognate sections which immediately follow it, are the work of the "'prentice hand"; and that "disorderly persons", a class defined by section 899 of the Code of Criminal Procedure, is meant by the use of the phrase "disorderly conduct". In the

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Code of Criminal Procedure vagrants are defined by section 887, as we have seen, and the sections which immediately follow prescribe the method of arresting and summarily dealing with them. Next comes section 899, which defines who are "disorderly persons", and the sections which immediately follow prescribe how they are to be arrested and summarily dealt with. The phrase "disorderly persons" is also correctly used in the said old charter, as we have seen. The intention of the draftsman of section 707 of the new charter was to prescribe the punishment for and place of imprisonment of these two classes of offenders, who are not tried as misdemeanants, as we have seen, but summarily dealt with, and who may therefore be disposed of by city magistrates, although they cannot try for misdemeanors. The two classes of offenders are of the same general class, and section 707 which mentions vagrants means to couple with them "disorderly persons", the same as they are kept close together in the Code of Criminal Procedure, but uses loosely the phrase "disorderly conduct" instead. As the relator was not charged or tried as a "disorderly person", it follows that she cannot be committed as such.

But if the phrase "disorderly conduct" must be taken literally in section 707, then we have to go outside of such section for a definition of it, and to see what it means, for such section does not define or create new offenses, but only refers to existing offenses. If this be not so, and the said section had to be taken as creating a new misdemeanor of the loose name of "disorderly conduct", it would follow that a magistrate could not try on a charge of it, as he cannot try charges of any misdemeanors whatever, as we have seen. The provision in the said section that the "court or magistrate before which or whom such conviction is had", shall impose the penalties there prescribed, was not meant to confer on magistrates the power to try charges for misdemeanors, contrary to section 1409, but only means, of course, a court, where a court tries the charge, which would be the case in respect of all misdemeanors, and a magistrate, where a magistrate may try, which would be the case only in respect of those offenses which are not, as we have seen, misdemeanors, but lesser offenses to be dealt with summarily, viz., those embraced under the heads of vagrants and disorderly persons. If we go outside of the said section to get the meaning of the said phrase, then, as has already

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been shown, it applies only to misdemeanors, and a magistrate has no jurisdiction to try charges therefor.

Moreover, the relator was not charged with "disorderly conduct" under the said section 707, but of a precise offense under another statute, as we have already seen, and was therefore not convicted thereof. And (though it may be repetitious) no one could tell what offense the naked phrase "disorderly conduct" would create or mean, if it had to be taken as used in the said section as meant to create an offense. Surely, no one will say it could mean and include anything a magistrate or court might please. If so, it would be more uncertain than the chancellor's foot. Criminal offenses have to be defined by the Legislature, and that power cannot be delegated to the executive or judicial departments. What one magistrate might choose to call "disorderly conduct" might appear to another to be wholly innocent and permissible. No such standard of criminal offenses is allowable.

The relator is discharged.

MICHAEL POWER, Plaintiff, *v.* THE ONWARD CONSTRUCTION COMPANY, AMERICAN SURETY COMPANY OF NEW YORK, BANK FOR SAVINGS, and the STANDARD MARBLE WORKS, Defendants.

(Supreme Court, New York Special Term, February, 1903.)

Mechanic's lien — Demurrer to the complaint upon the ground that another action is pending — Code C. P., § 488, subd. 4.

In view of the fact that a mechanic's lienor may assert his lien and at the same time sue for the debt it represents, a complaint for a money judgment for a bonded lien and to establish it against the surety is not demurrable merely because it alleges that, prior to the commencement of the present action, the plaintiff had commenced another, still undetermined, against the same defendant to recover the indebtedness set forth in the complaint, remaining uncollected, and this because the other action may have been one to recover the debt which was the foundation of the lien.

DEMURRER to complaint.

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William F. Clare, for plaintiff.

Mortimer Kennedy Flagg, for defendant The Onward Construction Company.

BLANCHARD, J. This is a demurrer to a complaint upon the ground stated in subdivision 4 of section 488 of the Code of Civil Procedure, that "it appears upon the face of the complaint that there is another action pending between the same parties, for the same cause." The complaint, after setting forth that the plaintiff performed certain work and furnished certain material for a building for the defendant, The Onward Construction Company, sets forth the value thereof and the amount remaining due thereon and then alleges the filing of a lien and the bonding thereof, all pursuant to the statutes of this State. Then follows the clause which is the source of the trouble, to wit: "That prior to the commencement of this action another action had been brought by this plaintiff against the defendant The Onward Construction Company to recover the amount of indebtedness hereinbefore set forth, and the said other action is still pending and undetermined; and that no part of said indebtedness has been collected." Relief is then prayed for, asking a money judgment against the defendant The Onward Construction Company, and that such sum be declared a valid lien and that the surety be adjudged liable therefor by virtue of the bond and for such other relief as may be proper. Defendant claims that by virtue of the clause before quoted the plaintiff has brought himself directly within the intent and meaning of the Code provision cited at the beginning of this opinion — its argument being that this is an action upon the bond given to discharge the lien and that the use of the words in the clause of the complaint before quoted, "indebtedness hereinbefore set forth," refers to this same bond. The plaintiff's claim, however, is that the "indebtedness hereinbefore set forth" refers to the money owing for the work and material furnished, and that he may pursue cumulative remedies, to wit, an action for the work and materials furnished and another for the maintenance and foreclosure of a lien. There can be no doubt of the plaintiff's right to pursue his remedy for the debt and the enforcement of the lien at the same time by different actions. Webb v. Van Zandt, 16 Abb. Pr. 190, 194;

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Raven v. Smith, 71 Hun, 197; Matter of Gould Coupler Co., 79 id. 206; Raven v. Smith, 87 id. 90; Smith v. Fleischman, 23 App. Div. 358. But the question here to be determined is, does the complaint on its face show that the other action is to establish a lien and recover the "cause" of action alleged in the complaint in this action. If it does not, then the demurrer must be overruled. All the clause before quoted states is that another action was commenced "to recover the amount of indebtedness hereinbefore set forth." It may very well be that the other action is an action to recover the amount of the debt which was the foundation of the lien. Certain it is that the complaint here does not show it is not. For aught that is contained in the complaint demurred to, the other action may be such a one, in which event, under the decisions cited, this action would still be proper. The demurrer will be overruled, with costs to plaintiff, with leave to defendants to plead anew upon payment of such costs.

Demurrer overruled, with costs to plaintiff, with leave to defendants to plead anew upon payment of costs.

WILLIAM H. KASTOR, Plaintiff, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Trial Term, February, 1903.)

New York city — Salary of a department clerk during his suspension.

Under L. 1901, ch. 466, § 1453, a clerk, of a department of the city of New York abolished on Jan. 1, 1902, unlawfully removed therefrom on Aug. 20, 1901, reinstated therein by a court order on Jan. 27, 1902, and re-employed on June 10, 1902 at the same salary by the borough president upon whom the duties of the department had devolved, is not entitled to salary from Jan. 1, 1902 to June 10, 1902.

ACTION for salary.

A. S. Gilbert, for plaintiff.

George L. Rives, Corporation Counsel (J. F. O'Brien, of counsel), for defendant.

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CLARKE, J. Prior to the 20th day of August, 1901, plaintiff was employed by the city under proper legal appointment as a senior clerk in the department of public buildings, lighting and supplies, at a salary of $1,000 a year. On that day he was unlawfully removed by Commissioner Kearney, the head of that department. On December 12, 1901, he commenced mandamus proceedings for his reinstatement, which resulted in an order entered January 27, 1902, which order directed "the respondent, Henry S. Kearney, as commissioner of public buildings, lighting and supplies, to reinstate the relator, William H. Kastor, to the place of senior clerk in said department, from which he was wrongfully removed, together with back pay from August 20, 1901, the date of his wrongful removal, and interest thereon from the various dates when said salary became due and payable." On the 1st day of January, 1902, twenty-seven days prior to the entry of this order, the amended charter took effect under the provisions of which the department of public buildings, lighting and supplies was abolished and the duties thereof devolved upon the borough president, Mr. Cantor, who, however, was not substituted in said proceeding as respondent. As matter of fact, plaintiff was, on the 10th day of June, 1902, re-employed by the city as senior clerk at the same salary under the borough president. He now sues for his salary for the period from the 20th of August, 1901, to the 10th of June, 1902. The city admits its liability from the 20th of August, 1901, to the 1st of January, 1902. Under the order plaintiff must be considered to have been a senior clerk in the department of public buildings, lighting and supplies up to the 1st of January, 1902. The order was made upon the facts as they existed on the 20th of August, 1901, the date of the unlawful removal. This is so as matter of law and is evidenced by the language thereof, it being a direction to Henry S. Kearney, as commissioner of said department, to reinstate relator as senior clerk in said department. But when made, said Kearney was not commissioner, nor was there any such department. If we consider that what ought to have been done was done, we may regard plaintiff as a senior clerk in said department up to the 1st of January, 1902. On that date the department was abolished. Section 1543 of the charter (L. 1901, ch. 466) provides: "Wherever in any department * * * an office, position or employment is abolished, or made unnecessary through

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the operation of this act * * * the person or persons legally holding the office or filling the position or employment thus abolished * * * shall be deemed to be suspended without pay, and shall be entitled to reinstatement in the same office, position or employment, or in any corresponding or similar office, position or employment, if within one year thereafter there is need for his or their services." In considering the effect of the charter changes, the Appellate Division said, in Matter of O'Toole v. Stewart, 75 App. Div. 497, of the department of buildings, and the same considerations apply to the department of public buildings, lighting and supplies: "The effect of this legislation was to abolish the department of buildings, to legislate out of office the board of commissioners, the head of the department, and the employees of such board in the various boroughs of the city of New York. * * * These employees were not thereby entirely removed from the service of the city, but because of the abolition of their office by the amendment of the charter, they were suspended without pay and entitled to reinstatement in the same office, position or employment, or in any corresponding or similar office, position or employment, if within one year there should be need for his or their services." If, therefore, the plaintiff is to be considered as having been restored to his position or employment as of the twentieth day of August, the date of his unlawful removal, and to have so continued until the 1st day of January, 1902, upon that date the statute abolished the department and suspended him without pay. That being the effect of the statute, I fail to see how in this action to recover salary he can succeed during the period of his suspension. Plaintiff may have judgment for the amount of his salary from August 20, 1901, to December 31, 1901, with interest, costs, and five per cent. allowance.

Judgment for plaintiff, with interest, costs, and five per cent. allowance.

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JOSEPH B. C. TUELL, Plaintiff, *v.* JOHN OVERTON PAINE et al., Defendants.

(Supreme Court, New York Special Term, February, 1903.)

Stock broker and customer — Fictitious sale — Sale where the margin is exhausted — Demand — Injunction.

Where a customer orders stock brokers to purchase for him certain stocks they must buy for him promptly, report the transaction to him, receive the stocks for him, and have the certificates ready for delivery to him whenever he shall call for them and pay the cost.

Where as matter of fact the stock brokers have never purchased the stocks for which they have rendered the customer an account, they cannot, in a subsequent action for an accounting between the parties, charge him with a loss resulting from the sale.

Where the stocks have been bought on a margin, the brokers cannot, upon its exhaustion, lawfully sell out the stocks unless the customer specifically waives tender of them, demand of payment of the balance due, and notice of the brokers' intention to sell the stocks at a fixed time and place.

Where the stock brokers never purchased the stocks the customer is excused from demanding them.

Relief by injunction refused.

ACTION against stockbrokers.

Henry W. Hardon, for plaintiff.

Charles E. Travis, for defendants.

GILDERSLEEVE, J. This suit arises out of dealings between the plaintiff and the defendants, as, respectively, client and stock brokers, and the relief sought is the opening and correction of two accounts rendered by the defendants to the plaintiff of stock transactions in April and May, 1901. By these accounts the defendants brought the plaintiff in debt to them in $13,083.21 through the April transactions, and in $3,779.88 through the May transactions. The plaintiff accepted the accounts as correct, and made no objection to them until the following October, when

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he disaffirmed all purchases of stock specified in the accounts as made for him between April 3 and May 10, 1901, on the ground that defendants never made those purchases and never received any certificates of the stocks so reported to have been bought for his account. The question of laches was expressly waived by the defendants on the trial. The defendants claim that they bought the stocks in question through one Hayden of Philadelphia; that plaintiff did not keep his margin good, and that when it became exhausted they sold the stocks for plaintiff's account at a loss, the amount of which they charged to him in the accounts here in question. Defendants also claim that plaintiff never demanded, nor paid for, the stocks which were so purchased for him. The complaint charges that the accounts were represented by the defendants to be "just and true," but that they were "false and fraudulent." In what respect they were fraudulent does not appear from the complaint, except, perhaps, by inference from the charge that they were false. Beyond this there is no evidence of fraud and I shall not regard the case as proceeding for fraud and deceit, but simply for an accounting, and shall treat the allegation that the accounts were fraudulent as not characterizing the action, but as surplusage only. Conaughty v. Nichols, 42 N. Y. 83; Greentree v. Rosenstock, 61 id. 583; Segelken v. Meyer, 94 id. 473. The relative rights and duties of the parties to this suit are easily determined by reference to familiar principles of law. It was the defendants' duty, upon receiving plaintiff's order to purchase the stocks for his account, to do so promptly, report the transaction to him, receive the stocks for him and have the certificates ready for delivery to him whenever he should call for them. Markham v. Jaudon, 41 N. Y. 235, 239; Douglas v. Carpenter, 17 App. Div. 329.

It is very clear from the evidence in this cause that the defendants never bought for the plaintiff the particular shares in question; the most they, perhaps, did was to give Mr. Hayden an order for them. Hayden never delivered the stock to defendants, and they never demanded it of him. The claim that they had this stock pledged with ninety-nine per cent. of all their stocks, and could, if plaintiff had demanded it, have obtained enough for delivery to him from the pledgees, or could have borrowed it and thus been in a position to make the delivery within what they call a reasonable time is not satisfactorily proved; but if it were

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it would be of no avail to them. If they really bought the stock for the plaintiff, it was his property from the moment it was purchased, subject, of course, to the payment of the purchase price (Dos P. Stock Br., 119; Markham v. Jaudon, 41 N. Y. 235, 240; Gruman v. Smith, 81 id. 25, 28), and defendants were bound to have it ready for delivery immediately on plaintiff's demand. This is the law, and, as Mr. Burr testified, the custom of brokers. Mr. Burr's language on the stand was "it (the stock) is held for the customer, and he (the broker) is obliged to deliver the stock to the customer at any time he asks for it; he must have it ready for the customer at any moment." See cases cited, *supra.*

Mr. Paine, one of the defendants, testified that, according to his understanding, the broker has a reasonable time in which to deliver securities to his customer, which he regarded as "about two weeks." Mr. Paine is not a member of the New York Stock Exchange, while Mr. Burr is; and he is also a member of its board of governors. But if Mr. Paine's view of the time allowed to brokers in which to deliver stock bought for a customer should accord with the custom, it is too unreasonable to obtain the sanction of the law. Evidence was given to show that, by the rules of the Stock Exchange Clearing House, a broker receives, on settlement, only the difference between the quantity of stock sold and the quantity bought by him; that is, if for several customers he buys 1,000 shares and sells 900 shares he receives the difference between these two amounts, viz., 100 shares. That custom, however, cannot affect the relations between the broker and his customer. The latter is entitled to the stock which is bought for him without regard to the rights of other customers. It would be a strange thing if a broker could excuse his failure to deliver to his customer stocks bought for him on the ground that, at the clearing-house his sales and purchases in a given case balanced each other, and that, therefore, he had no stock for his client. Holding, as I must, on the testimony that the defendants did not purchase the stocks charged to the plaintiff in their accounts rendered, the plaintiff is not chargeable with any loss on the sale thereof since the defendants could not sell for plaintiff's account stocks which they never received for him.

The defendants claim that they had the right under their agreement with the plaintiff to sell his securities when his margin was

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exhausted. The terms of this agreement do not appear, and in the absence of a specific agreement on the part of the plaintiff waiving, not only tender of the stock and demand of payment of the amount due the defendants, but also notice of their intention to sell his securities in default of such payment, with the time and place of sale, the sale was wrongful. Wilson v. Little, 2 N. Y. 443; Markham v. Jaudon, *supra;* Stenton v. Jerome, 54 N. Y. 480, 483; Usher v. Van Vranken, 48 App. Div. 416. No question of the plaintiff's duty to demand the stocks in question arises in the case. As the defendants had no stocks to deliver to the plaintiff no demand by him was necessary.

The injunctive relief asked for in the complaint cannot be granted; it was not shown that defendants were insolvent, nor is this a proper case for that measure of relief. Park v. Musgrave, 2 T. & C. 571.

Judgment for the plaintiff, that the account be settled in accordance with these views. Let findings or a decision be submitted.

Judgment for plaintiff.

SARAH MAY LE BRANTZ, Plaintiff, *v.* WILLIAM G. CONKLIN, Individually and as Executor of an Alleged Last Will and Testament of Sarah Ann Waters, Deceased, et al., Defendants.

(Supreme Court, New York Special Term, February, 1903.)

Action to establish a will and determine rights under conflicting wills of the same testatrix — Receiver.

Where three persons claim adversely to each other under three separate wills of a testatrix, alleged, by the beneficiary of the oldest will, to have been suffering from senile dementia for the last two years of her life and when she executed the two other wills, the said beneficiary may maintain an action in the Supreme Court to establish her will and therein may have the beneficiaries of the other wills enjoined from proceeding to probate them — to the end that the rights of all the claimants may be established in one action rather than in a series of contests in the Surrogate's Court.

Where the plaintiff also asks that certain transfers, from the testatrix to the chief beneficiary under the second will, be decreed

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void, that he turn over to the executors of the oldest will the property transferred and be enjoined from disposing of any property he received from the testatrix, property is involved as the subject of the action, and therefore the Supreme Court may appoint a receiver; but where it appeared that, under the second will, a trust company had already been appointed temporary administrator, the court intimated that it would not appoint as receiver any one other than the trust company.

ACTION to establish a will and for other relief.

Alexander S. Bacon, for plaintiff.

Delafield & Longfellow, for Wm. G. Conklin.

Morton Stein, for defendant Una May Mullins.

M. W. Divine, for defendant Campbell.

Gifford, Stearns & Hobbs, for Mary E. Corkery.

Hornblower, Byrne, Miller & Potter, for defendant New York Security & Trust Co.

John K. Erskine, for defendant W. L. Le Brantz.

LEVENTRITT, J. This is an action brought by the plaintiff, child of an adopted daughter of the testatrix, to establish as her last will and testament an instrument dated January 28, 1899; that two subsequent wills dated respectively April 14, 1902, and November 11, 1902, be cancelled and decreed void; that certain deeds and assignments of mortgages standing in the name of the defendant Conklin, who is the chief beneficiary under the will of April 14, 1902, be cancelled and decreed void; that he be directed to turn over to the executors of the earliest will all the property he has received from the testatrix during the last two years of her life; that he be enjoined from otherwise disposing of any of the property received from her and, together with the defendants claiming under the will of November 11, 1902, from proceeding to the probate of the subsequent wills or the appointment of an administrator. The complaint also prays for the appointment of a temporary receiver.

It is claimed in the complaint and in the numerous affidavits

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submitted, that the testatrix Sarah Ann Waters was incompetent and suffering from senile dementia during the last two years of her life, and that both of the wills executed during that time were procured by fraud, trick, duress and undue influence.

It also appears that the defendant Conklin on the day of the testatrix' death filed the will under which he claims for probate, and secured the appointment of a trust company as temporary administrator, to which he then, or since then, turned over all the property in his possession, with the exception of a certain house which he claims under a deed to him during the lifetime of the testatrix, but which, according to his own affidavit, it appears he took to hold in trust during her life, to become his at her death.

The defendant Conklin in his answer, containing substantially a general denial, asks the dismissal of the complaint, while the defendant Campbell, claiming under the third will, asks in addition that that will be established.

I do not propose on this application to be drawn into any discussion of the voluminous facts, charges and countercharges. It would be manifestly unfair to all the parties to allow the disposition of the preliminary motion to depend in any wise on decisions of questions of fact which can only be satisfactorily determined on the trial. Even were it desirable, I would find it impossible to do so. The preliminary question of the testatrix' capacity underlies the whole proceeding. On the papers before me, that is a complicated question. Beyond that the liberal charges of fraud and undue influence, emphatically made and circumstantially supported, and as emphatically and circumstantially denied, make this peculiarly a case where the court without the parties before it is on extremely dangerous ground in seeking to place its judicial finger on the exact truth.

In view of the varied interests represented and in furtherance of such litigation as will best dispose of most of the questions in one suit, I am disposed to enjoin the proceedings in the Surrogate's Court until the determination of this action. The form of action brought by the plaintiff has the support of authority. Code Civ. Pro., § 1865; Voorhees v. Voorhees, 39 N. Y. 463; Bowen v. Idley, 6 Paige, 46. If she succeeds in establishing the will, she may obtain the relief cancelling the deeds and assignments prayed for. Voorhees v. Voorhees, *supra*. So, too, the subsequent wills will be set aside as invalid. Bowen v. Idley, *supra*. Failing in

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her attempt, the defendant Campbell may, by virtue of the prayer in his answer, establish, if he can, the will under which he claims, or the defendant Conklin, by an amendment of his pleading, obtain the relief so far as his instrument is concerned. It must be obvious that, granting the power, all the matters relating to the wills should be disposed of so far as possible in one proceeding, instead of in a series of contests in the Surrogate's Court. As the power exists, I exercise it.

The remaining question is as to the appointment of a receiver. The point is made that the court is without power, except in the single instance provided for in section 1869 of the Code, and that this is not such a case. So far as this particular litigation is concerned, the power may be found in section 713, if not in the inherent authority of the court. This is not merely an action for the establishment of a will, but by virtue of the further allegations and the prayer for relief relating to the deeds, assignments and other assets, involves property as the subject of the action.

Irrespective of this consideration, however, I see no reason why the property is not adequately preserved and will not properly be protected if left in the custody of the present temporary administrator. It is asked that a receiver be appointed in its place; I am willing to designate it receiver if thereby the protection or administration of the estate will be furthered. But I am not satisfied that its appointment should be either directly or in effect cancelled by designating a new receiver. The vague fears expressed are not facts. Nothing tangible is offered which would justify the inference that it will not be conscientious in the performance of its duties or rigorous in its pursuit of any further assets of the estate that may be disclosed. Perhaps its appointment as receiver may be advisable to bring it under the direct control of the court. I will hear counsel on this point on the settlement of the order, which is to be drafted on the lines suggested in this opinion. In conclusion, I would say that I see no reason why an exception has been made in the case of the one piece of property not turned over to the temporary administrator and that the order should also contain some provision directing its transfer to the custodian.

Ordered accordingly.

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CHARLES T. BARNEY, Plaintiff, *v.* THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS for the City of New York et al., Defendants.

(Supreme Court, New York Special Term, February, 1903.)

Injunction — Refused an abutting owner to restrain pendente lite the construction in Park ave., New York city, of the rapid transit tunnel — Curable illegality — Indemnity.

Although the New York city rapid transit tunnel in Park avenue, between 34th and 42d streets, is unlawfully constructed to the extent that it is located twenty-eight feet too far to the east, the Supreme Court, in view of the imperative necessity for rapid transit in the city, will not temporarily enjoin its construction upon the ground that it is a public nuisance, cause it to be filled solid and have a new tunnel constructed in the avenue farther west in the proper location at a probable expense of $700,000 and causing great delay, merely because drilling and blasting have diminished an abutting owner's peaceful enjoyment of his property and its easements and the prospective operation of the road may threaten permanent injury to his property, it appearing that the foundations of his dwelling have not been affected, that the annoyance to him from drilling and blasting will not be much in excess of what it would have been had the tunnel been built as located on the plans adopted, that drilling and blasting are nearly concluded, and that this particular section of the tunnel soon will be and necessarily must be soon completed.

Where the illegality arising out of the tunnel's having been constructed too far to the east is curable by action in the courts and such action has been initiated, the court will give this point consideration in determining whether it will grant a preliminary injunction.

The owner is, however, entitled to a bond indemnifying him against all possible loss.

ACTION for an injunction.

Masten & Nichols, for plaintiff.

George L. Rives, Corporation Counsel, for defendant City of New York.

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Edward M. Shepard, Boardman, Platt & Soley, for defendant Board of Rapid Transit Commissioners.

Nicoll, Anable & Lindsay, for defendant John B. McDonald.

LEVENTRITT, J. Two public considerations have controlled my disposition of this application; that of the public safety and that of the public interest. The first has regard to the present; the latter to the immediate future. It is not to be gainsaid that there has been in this section of Park avenue a substantial and as yet unauthorized deviation from the established plan. It is unnecessary to review the reasoning leading to this conclusion, as I find myself in accord with its sequence, as contained in Barney v. City of New York, 38 Misc. Rep. 549. If anything, the plaintiff builds a stronger case in this action which he brings to protect his property rights by way of injunction than in the former suit which he brought under the statute as a taxpayer.

The plaintiff seeks in this action to enjoin the further construction of the rapid transit tunnel in front of his premises on Park avenue. The present easterly wall of the tunnel follows a line only seven feet distant from his house line, whereas the original plan as filed and adopted shows the easterly extremity between twenty-seven and twenty-eight feet farther west. The plaintiff claims that the present construction, with its blasting and steam drilling and attendant noises, violates the peaceful enjoyment of his property and its appurtenant easements, while the prospective operation of the road threatens serious permanent injury. The complaint is framed on the theory of public nuisance with allegations of special damage to the plaintiff. The injunctive relief prayed for is that not only the further construction of the tunnel along the present line be enjoined but that the excavation so far made be filled in and the subsurface restored so near as may be to its previous condition.

That the present construction is unauthorized must be conceded; so, too, it may be admitted that the plaintiff shows resulting damage special to himself; but yet, after careful consideration, I am satisfied that the injunction asked should not issue.

Were the entire construction on or under Park avenue, wherever placed illegally and unauthorized, there could be no question

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in any case of the plaintiff's right to the relief asked. That, however, is not the situation here. Were the easterly tunnel about twenty-eight feet farther west its lawfulness would be beyond attack. The damage, therefore, on which the plaintiff can predicate his prayer is not the damage for the entire tunnel construction but only for the excess resulting from the more easterly construction. Or, to speak in mathematical terms, it is the total damage resulting from the authorized westerly construction subtracted from that resulting from the unauthorized more easterly construction which gives the amount of special injury to the plaintiff on the basis of which he can come into a court of equity with the form of action he has adopted. While the difference of damage is appreciable and measurable, I am not satisfied that it is large. The plaintiff does not claim that his foundation walls are impaired. The chief complaint is due to the blasting and drilling, present and prospective vibration and to some extent the impeded approach to his building by the presence of various temporary structures in the streets. So far as the blasting and drilling are concerned, together with their attendant noises and vibrations, there is this to be said: The affidavits satisfy me that this portion of the work is nearly completed and that the increased noise, if any, is minimal. With reduced charges of dynamite as the house-line is approached it by no means follows that the noise and vibration of detonation are necessarily greater. So far as the temporary structures are concerned, they are sufficiently accounted for by the concededly legal part of the structure — the westerly tunnel.

Were this merely an action between private individuals, or even an ordinary action against the municipality, the extent of the plaintiff's special damage might be immaterial. Slight damage would be sufficient to enjoin the continuance of the nuisance. Beekman v. Third Ave. R. R. Co., 153 N. Y. 144; Adler v. Metropolitan El. R. Co., 138 id. 173. But this is not the ordinary case and it is one which, in my opinion, justifies the application of the rule that where the damage resulting from the allowance of the injunction to the defendant far exceeds that resulting to the plaintiff from its disallowance, the equitable arm of the court should not be raised in restraint. Gray v. Manhattan R. Co., 128 N. Y. 509; Riedeman v. Mount Morris Electric Light Co., 56 App. Div. 23. It is here that the minimal excess

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of damage suffered by the plaintiff by the present structure over that he would have suffered had the road been constructed according to the original plan, becomes most material.

In McElroy v. Kansas City, 21 Fed. Repr. 261, Mr. Justice Brewer well states the recognized rule thus: "A chancellor, in determining an application for an injunction, must regard not only the rights of the complainant which are sought to be protected, but the injuries which may result to the defendant or to others from the granting of the injunction. If the complainant's rights are of a trifling character, if the injury which he would sustain from the act sought to be enjoined can be fully and easily compensated, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer a large inconvenience if the contemplated act was restrained, the lesser right must yield to the larger benefit; the injunction should be refused, and the complainant remitted to his action for damages. * * * If the improvement was one of great public importance, the court would justly regard that as a reason for not lightly interfering with the work, while if the improvement was more of a personal speculation and for private gain, the prior protection of the complainant would be most rigorously insisted on. Thus, if in the center of a large and thriving city like the defendant some improvement was contemplated which the necessities of business proclaimed to be urgent, the court on no slight consideration should interfere to delay or restrain it; while, on the other hand, if it was some matter in the outskirts of the city, having obviously principal reference to the private speculation of the individual, and of no earnest or urgent demand of public good, the attention of the court would be properly directed to the full protection of the complainant's prior right."

It is unnecessary at this late day to descant on the great public importance or the urgency of the improvement it is sought to enjoin. Our own Appellate Division has characterized it as "an imperious necessity." Matter of Rapid Transit Commissioners, 23 App. Div. 472. This was five years ago. If it was imperious then, it is difficult to find an adjective that will adequately express the crying need of the present hour. A traffic-congested city awaits the opening of the underground railroad like a deliverance and the fulfillment of prophecy. The court

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should not lightly interfere to postpone the opening of the road by even a single day. The slight injury to the plaintiff is quite lost in the magnitude of the public improvement and the large public need.

Quite a different question might be presented if the illegality complained of were incurable. If the entire construction were unauthorized and could never be validated the plaintiff upon adequately showing irreparable damage peculiar to himself might see his rights rise paramount even in this form of action. But the deviation from the established plan can be made legal. Rapid Transit Act, § 38. Failing to obtain consent of the property-owners application may be made to the Appellate Division to sanction the departure from the original plan. The preliminary steps to this end have been taken, and the affidavits contain the assurance that the proper form of application is about to be made. While the court will ordinarily concern itself only with the existing facts, I believe I am justified, in view of the public interests involved, of taking the ultimate and probable correction of the unsanctioned step into consideration. In any event this should be considered on the application for the preliminary injunction and the parties should be left to establish their final status on the trial.

Lastly, considerations of the public safety compel the denial of the broad relief asked by the plaintiff. It has already been shown that the tunnel in front of his premises is well-nigh completed; the blasting and drilling are almost over; the side-walls are constructed and are prepared to receive the mason-work arch which will support the overlying surface of the street. The present support is of timber; this must be replaced by the arch necessitating the removal of some of the roof-rock. I am quite satisfied by the expert affidavits submitted that the rock is of a shaly, treacherous character, liable to rapid disintegration by the chemical action of the air and the percolation of water. There has already been one dangerous subsidence in this locality and, to avoid its repetition or similar accidents, considerations of safety require that this section of the tunnel be brought to a stable condition with the least delay. That done all other questions may be left to the trial. Before the running of the first train the issues herein will be reached for trial and the application to legalize the construction be passed upon by the Appellate Divi-

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sion. To direct at this stage the filling in with concrete of the present excavation and the building a new tunnel farther west at a total expense of perhaps $700,000, and a delay of several years — as appears from the affidavits — when the ultimate result may be the removal of the filling and the authorized use of the present excavation, would hardly be consonant with the public interest.

The plaintiff, however, should have a bond to indemnify him against all possible loss. Any directions in the order, not inconsistent with the prosecution of the work as here sanctioned, which he deems necessary for his protection, I am disposed to give him, and I will hear counsel on this point on the settlement of the order.

Ordered accordingly.

THE PEOPLE ex rel. PETER J. GARVEY, Relator, *v.* THE DEMOCRATIC GENERAL COMMITTEE OF NEW YORK COUNTY, Sometimes Known as THE DEMOCRATIC REPUBLICAN COMMITTEE OF NEW YORK COUNTY, J. SERGEANT CRAM and JOHN T. OAKLEY, Respondents.

(Supreme Court, New York Special Term, February, 1903.)

Primary Election Law — Rules of a general committee, how amended.

Where the existing rules of the county general committee of a political party provide that the executive committee shall consist of one member from each assembly district, the general committee cannot defeat the right of an assembly district to such membership, by, first, having the right of the delegates of that district to membership in the general committee contested, and then passing, without previous notice, a resolution that one person from each uncontested assembly district shall constitute the executive committee.

The practical effect of the resolution is to amend the rules without notice, in violation of the Primary Election Law (L. 1899, ch. 473, § 9, subd. 2) which declares that they shall not be amended except upon reasonable notice.

APPLICATION for a peremptory writ of mandamus.

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James, Schell & Elkus, for relator.

Steuer, Hoffman & Wahle, for respondents.

LEVENTRITT, J. This is an application for a peremptory writ of mandamus requiring the respondents to recognize the relator as a member of the Democratic General Committee and to recognize as a member of the executive committee the person duly chosen by the petitioner and his fellow members from the ninth assembly district.

The relator and 213 others were at the primary election of 1902, pursuant to the provisions of the Primary Election Law (Laws 1899, chap. 473) elected as delegates to or members of the Democratic General Committee. They thus became absolutely entitled to their seats on that committee and possessed of all the rights and privileges of any other member, incapable of being expelled on any pretext whatever. People ex rel. Coffey v. Democratic Committee, 164 N. Y. 335. It was conceded on the argument what, under existing law, could not be disputed, that the relator and his associates were members of the General Committee with all the powers pertaining to the office.

The contested question was whether the delegates from the ninth assembly district were entitled to have one of their number designated as a member of the executive committee.

The solution of this question is primarily dependent on the rules and regulations in force at the time the General Committee met on December 30, 1902, for the purpose, among other things, of electing or designating its executive committee.

The Primary Law provides that the rules and regulations adopted by the last preceding General Committee shall remain in full force and effect until repealed or amended in accordance with the provisions of the act (§ 9, subd. 1). On December 30, 1902, when the first meeting of the General Committee, elected that fall, was held, the rules and regulations of the previous year were in force, unrepealed and unamended. Article 5, so far as applicable, provides for: "An executive committee to consist of one member from each assembly district, with the exception of the Thirty-fourth district, in which district there shall be one member for that portion of the district lying south of the Harlem river, and one member for that portion of the district lying

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north of the Harlem river, with the chairman and treasurer of the General Committee, the chairman of the committee on finance, the chairman of the committee on printing, the chairman of the committee on resolutions and correspondence, the chairman of the committee on election officers, the chairman of the committee on public meetings, and the committee on law and the committee on municipal affairs as *ex officio* members.

"No *ex officio* member of the executive committee other than the chairman and treasurer of the General Committee and the chairman of the committee on finance shall be entitled to a vote.

"The member from each assembly district and from the annexed district shall be chosen by the members of the county committee from each assembly district and annexed district, and their names reported at the first meeting of the county committee. In the event of the members from any district being unable to agree upon a member for the executive committee, the president shall appoint one of the members of the county committee from such district to act as a member of the executive committee."

Therefore, when the General Committee met, the rules and regulations guaranteed to the voters of the ninth assembly district representation through one of their delegates on the executive committee. It appears as a fact, to be accepted as true on this application, that the delegates from that district had chosen and were prepared to report one of their number as a member of that committee.

As a result of the occurrences of the meeting of December thirtieth, the ninth assembly district was deprived of its representation on the executive committee. The sole question here is whether this was according to the rules and regulations. It is not contended that the procedure followed the rules and regulations of the last preceding General Committee, as quoted, but it is claimed that, so far as the designation of the executive committee was concerned, these were superseded. The sole method of accomplishing that is given by subdivision 2 of section 9 of the Primary Election Law, which provides: "The rules and regulations of parties, and of the conventions and committees thereof, shall not be contrary to, or inconsistent with, the provisions of this act, or of any other law, *and shall not be amended except upon reasonable notice.*"

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Without any previous notice, and without being characterized as an amendment to the rules and regulations, there was offered and adopted at the meeting of December thirtieth a resolution in the following language: "Resolved, that the districts be called in their order, and that one person from each *uncontested* district and the annexed district, with the exception of the Thirty-fourth district, in which district there shall be one person from that portion of the district lying south of the Harlem river, and one person from that portion of the district lying north of the Harlem river, be named to constitute the executive committee for the year 1903."

Immediately prior to the adoption of this resolution a protest had been made against the seating of the delegation from the ninth district and their right to membership on the General Committee contested. It is perfectly clear from the papers that the resolution was aimed solely at that district. Without attempting, therefore, to pass upon the question whether such a discrimination would in any event be legal, even if accomplished according to the forms of law, it may be said that, extending the principle and the spirit of the Coffey case to that at bar, such a discrimination would not be countenanced, as in effect being a disfranchisement of the voters of an assembly district acting through their chosen representatives.

Here, however, the forms of law have not been observed. The resolution and the previous rules and regulations are in conflict; and the former was illegal and ineffective because the necessary precedent steps had not been taken. In the absence of any notice, reasonable or otherwise, the rules and regulations could not be amended. It was designed that the Primary Law "should control not only the *choice* but the *conduct* of political committees" (People ex rel. Coffey v. Democratic Committee, *supra*, p. 344) and its provisions cannot be nullified by the adoption of a resolution operating by indirection to establish an unauthorized amendment. Terming it a resolution, when, in fact and effect, it was an amendment, does not relieve it of the necessity of having as its support the conditions precedent required by the Primary Law.

I do not deem it material whether or not the relator voted for this resolution. He asserts that he did not, and no claim is made that he did. It is clear that he voted for no declared

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amendment of the rules and regulations, and he is therefore entitled to invoke those which were in force at the time his rights were infringed upon.

I allow a peremptory writ of mandamus as a strict legal right. Political committees are under the control and mandate of statutes. They require that in party matters, the voters through their representatives, whether one or two degrees removed, shall express their wishes. If the result is that an undesirable associate is forced on the other members of a committee, or a subcommittee acting for it, the remedy is not in the committee but in the education of the voters. A principle is involved and the individual case must not be allowed to sanction a departure bad in precedent, unsound in law, and thoroughly inharmonious with democratic doctrine.

Application granted.

CHARLES HUESTON HASTINGS et al., Plaintiffs, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Special Term, February, 1903.)

New York city — Municipal grant of lands under water on the Harlem river.

In 1865 the city of New York granted to the plaintiffs' mesne grantors, as owners of the adjacent upland, lands under water on the Harlem river extending from high water mark to the bulkhead line as established in 1859, and the grant made that line the easterly boundary of the premises. Along that line the city had before 1859 laid out an exterior street but never has constructed it. The grant reserved to the city streets and avenues existing, or shown on an annexed map, but required the grantees to construct them, as well as wharves and bulkheads, on three months' notice. The city granted to the grantees all wharfage etc. from "that part of the exterior line of the said city lying on the easterly side of the hereby granted premises fronting on the Harlem river". In 1873 Seventh avenue, an avenue within the boundaries of the grant, was made at the expense of the abutting owners and was lawfully carried out to the bulkhead line. The city licensed certain structures, floating or on piles, to be placed within the boundaries of the grant along and outside of the

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bulkhead line; and in 1897 of its own motion built at the foot of Seventh avenue along the bulkhead line a permanent bulkhead platform and began and has since continued to collect wharfage etc. therefrom.

Held, that the plaintiffs were entitled to the removal of any of the said structures, floating or on piles, located on lands lying between the streets and avenues and to have the city enjoined from granting any similar licenses hereafter, but that, so long as the exterior street remained unconstructed, they were not entitled to the removal of any structures (excluding from consideration the bulkhead platform at the foot of Seventh avenue) which laid wholly within the lines of the projected streets.

That the words of the grant gave the plaintiffs the right to wharfage etc. from the exterior street when constructed, and that, as the city had elected to construct the bulkhead platform, at the foot of Seventh avenue, without requiring or permitting the plaintiffs to do so, the city must account to them for the wharfage collected there by it or pay them the permanent value of their rights, if the city should elect to retain the bulkhead platform for its own use.

ACTION for equitable relief and for an accounting.

Carter & Ledyard (Joseph W. Welsh and Edmund L. Baylies, of counsel), for plaintiffs.

George L. Rives, Corporation Counsel (E. J. Freedman, of counsel), for defendant.

SCOTT, J. On November 8, 1865 the mayor, aldermen and commonalty of the city of New York, being the owner of the land under water on the Harlem river between One Hundred and Fifty-first street and One Hundred and Fifty-fifth street, and extending from the then high-water mark to the bulkhead line, or line of solid filling established by the Legislature, granted said land under water to Lucy S. Develin and others, the owners in fee of the adjacent upland. The plaintiffs are the successors in title to these grantees. Prior to the making of this grant the Legislature, by chapter 285, Laws of 1852, had authorized the mayor, aldermen and commonalty of the city of New York to lay out and fix a permanent exterior street along the entire water front of the Harlem river. In 1858 the board of

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aldermen and common council directed the street commissioner to fix and lay out such an exterior street, seventy feet wide, along the shore of the Harlem river. In pursuance of the foregoing act and resolutions, and in the year 1859 maps were prepared and duly confirmed laying out and permanently fixing the exterior street, seventy feet in width along the harbor commissioners' exterior line, or bulkhead line of solid filling which had been established by the Legislature in 1859. This line was mentioned and referred to in the grant to plaintiffs' predecessors, and was designated on the map attached thereto as the easterly boundary of the premises therein described. The Act of 1852 also provided that the several streets and avenues as laid out in the map of the city according to law should be continued and extended along the present lines thereof from their present termination on the map to the said exterior street and permanent line. The land under water granted to plaintiffs' predecessors is described in the grant, in bulk, by a description which includes all the land under water in front of the grantees' upland, and extending between high-water mark and the bulkhead line or line of solid filling above referred to "saving and reserving out of the hereby granted premises so much thereof as may form part of any street or streets, avenue or avenues, that may now or hereafter be designated or laid out through said premises according to law for the uses of public streets, avenues or highways as hereinafter mentioned." Attached to the grant was a map or plan showing the property granted and the streets and avenues projected to be laid out when the land under water should be reclaimed and filled in. The grant was made in consideration of a specified sum of money, and of certain covenants on the part of the grantees to the effect that they would build, make and erect, within three months after being required by the city to do so, good and sufficient bulkheads, wharves, streets and avenues that may be designated or laid out through the premises described, and fill in, regulate and pave the same and lay out sidewalks thereof, and further that they would not build said wharves, bulkheads, streets or avenues or make the lands until permission shall be first had and obtained from the city. The city, upon its part, covenanted that the grantees and their successors in interest, upon observing, fulfilling and keeping all and singular the articles, covenants and agreements on their part "shall and

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may from time to time, and at all times hereafter, fully have and enjoy, take and receive and hold to their own proper use all manner of wharfage, cranage, advantages and emoluments growing or accruing by or from that part of the exterior line of the said city lying on the easterly side of the hereby granted premises fronting on the Harlem river, with full power to collect and receive the same for their own proper use and benefit forever." The plaintiffs or their predecessors in interest, without express permission from the city but without objection on the part of the city, have filled in within the limits of the grant, below the high-water mark designated therein, certain portions of the streets intersecting the granted lands, but such filling does not include any part of the exterior street, nor have the plaintiffs or their predecessors in title ever built or erected or caused to be built or erected any wharf or pier or other obstruction in the Harlem river in front of the premises described in the grant. Among the streets shown on the map attached to the grant as intersecting the granted premises, is Seventh avenue, which terminates at the Harlem river. This avenue was regulated, graded, curbed and flagged by the city, at the locality in question, in 1873, and the cost thereof was assessed upon the adjoining property and paid by the owners thereof. In 1877, and again in 1887, the city permitted pile platforms to be erected at the foot of Seventh avenue. In 1897 the city at its own expense, through the department of docks, built a bulkhead platform along the bulkhead line, as shown on the map annexed to the grant, at the foot of Seventh avenue and has collected and received for its own use whatever wharfage and profits arose therefrom. This was done without notice to, or consent of, the plaintiffs or their predecessors in title. Certain other structures have been erected under licenses from the city, within the lines of the premises described in the grant and outside of the present line of filling. For the most part these structures have been erected within the lines of the streets excepted and reserved out of the grant. The plaintiffs ask that the city be required to remove that portion of the bulkhead already constructed at the foot of Seventh avenue, or in default thereof that it be required to pay to plaintiffs the value of the wharfage, cranage, advantages and emoluments arising therefrom, and to account for the wharfage and cranage already realized therefrom, and that all licenses for other structures, either

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floating or on piles, within the limits of the grant be revoked, and said structures removed, and the city be restrained from issuing further licenses for like structures. A number of cases involving similar grants have come before the courts for determination, and it is well settled so far as concerns the ownership of the land that the city retains title to so much of the land as lies within the exterior lines of the projected streets and avenues, while the grantee becomes the absolute owner of the land between the streets. Duryea v. Mayor, 62 N. Y. 592; 69 id. 477; Langdon v. Mayor, 93 id. 149. Hence the grantees and their successors in interest have no right to fill in or occupy for any purpose, without permission of the city, any portion of the land under water lying within the projected streets, nor, on the other hand, has the city the right, without like permission from the grantees, to occupy for any purpose or license others to occupy any portion of the land under water lying between the projected streets. So far therefore as concerns any structures floating or on piles, which occupy land within the boundaries of the grant and between the projected streets the plaintiffs are entitled to a judgment for their removal and an injunction against the granting of licenses in the future.

As to the structures, other than the bulkhead at Seventh avenue, which lie wholly within the lines of the projected streets, a different question is presented. As has been said the property which they occupy remains the property of the city, and the plaintiffs have no interest in them or concern as to their maintenance unless it is to be spelled out of the grant. That grant included the right to have and enjoy the wharfage and cranage advantages and emoluments growing or accruing by or from "that part of the exterior line of said city lying on the easterly side of the hereby granted premises lying on the Harlem river." The point at which these emoluments were to be collected is thus precisely defined, and, reading the whole grant in conjunction with the map accompanying it, there can be no doubt that this exterior line means the easterly line of Exterior street. Before wharfage and cranage can be realized at that point it is necessary that Exterior street shall be constructed. Even assuming that, when Exterior street has been constructed, the plaintiffs will have the right to take wharfage and cranage opposite the ends of the streets, as well as opposite the intervening land, there is no ground for an infer-

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ence that the parties intended that the grantees in the conveyance were to take wharfage at the foot of any street at any point farther inland than the exterior line of the city on the easterly side of Exterior street. Mayor v. Law, 125 N. Y. 380, 393. The plain meaning of the grant was that the city was to determine when Exterior street should be constructed and that the plaintiffs' right to wharfage and cranage should accrue when, and not until this was done. So far then as concerns the structures erected or floating within the lines of the projected streets the plaintiffs have no right to complain of them as trespassers because they occupy no land to which the plaintiffs have title, and they cannot demand their removal, or ask to receive the profits derived from them by the city, as infringement upon the right of wharfage and cranage conveyed by the grant, because such right will attach only when Exterior street has been completed.

There remains the question as to the bulkhead erected by the city at the foot of Seventh avenue, the easterly line of which is the easterly line of Exterior street as shown on the map attached to the grant, and the easterly line of the premises described in the grant. The defendant claims that even if the plaintiffs should be required or authorized to build and actually should build and maintain the streets and avenues mentioned in the grant, including Exterior street, they would have no right under the terms of the grant to any of the wharfage and profits accruing from those portions of the exterior line of Exterior street which lie in front of the several streets running through the premises, and that, as the bulkhead now under consideration is at the foot of one of the avenues excepted from the grant, and the land upon which it is erected belongs to the defendant, the plaintiffs have no right to any of the profits derived therefrom. A similar question was presented and passed upon by the Court of Appeals adversely to the defendant's contention. Mayor v. Law, *supra*. I can see no escape from the authority or the reasoning of that case, and I find no material difference between the facts which present the question in this case, and those which presented a similar question in that case. Nor does it in my opinion affect the plaintiffs' rights in the premises that the city has undertaken to build the bulkhead itself instead of requiring the plaintiffs to build it. It is true that it was said, of grantees under a similar grant in Mayor v. Law, *supra*, that "when they had constructed Tompkins street

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or any portion of it, upon request of the city, then and not until then, can they commence to take wharfage." There was no question in that case, however, of taking wharfage from a part of Tompkins street constructed by the city. The defendants in that action had undertaken, without order or permission, to erect a wharf and collect wharfage, and this the court held they could not do. Under the grant to plaintiffs' predecessors they were not only required to construct Exterior street and the other streets when ordered by the city, but were expressly authorized to do so. Nothing was left to the city but the right to determine when such construction should be undertaken. When it had determined that Exterior street should be constructed, the plaintiffs had the right to construct it and thereupon to collect and enjoy the wharfage and emoluments. The city might postpone indefinitely, or so long as it saw fit, the plaintiffs' right to collect wharfage by neglecting to order Exterior street to be constructed and by refusing permission for its construction. But whenever it was determined that the street or any portion of it should be constructed the plaintiffs were entitled to undertake the construction and thus entitle themselves to the wharfage. While the city could postpone the collection of wharfage by postponing the construction of the street, it could not nullify the grant and defeat the plaintiffs' rights thereunder, by constructing the street itself without having first afforded the plaintiffs an opportunity to comply with their covenant to construct it when required to do so. When the city built the bulkhead at the foot of Seventh avenue it performed a part of the work which plaintiffs had agreed to do, and which we are bound to assume they would have done if required. As to the portion so constructed the city, by this act, waived the right to require the plaintiffs to build, but did not and could not defeat the plaintiffs' right to wharfage, which attached as soon as the bulkhead was completed. The present bulkhead was constructed in 1897. Prior to that time there had been piles driven and platforms erected to facilitate the progress of certain public improvements, but it does not appear that these were in the nature of a permanent bulkhead. It does appear that the city collected no wharfage until November, 1897. The plaintiffs are entitled to a judgment that they are entitled to the wharfage, cranage, emoluments, and profits to be derived from the bulkhead at the foot of Seventh

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avenue, and to an accounting for the value of such rights since November 16, 1897, and for the payment of the permanent value of such rights if the city elects to retain the same for its own use and benefit.

The form of the decision and decree may be settled on notice, and, since neither party has been wholly successful the decree will be without costs to either party.

Judgment accordingly.

EDWARD D. W. LANGLEY, Individually and as Administrator, etc., Plaintiff, *v.* THE WESTCHESTER TRUST COMPANY, as Substituted Trustee, et al., Defendants.

(Supreme Court, New York Special Term, February, 1903.)

Devise — When devisees do not take by survivorship as a class.

Where a testator devises his residuary estate to his sister and his two brothers, to be equally divided between them share and share alike, the share of a brother, who died before the testator, does not pass to the survivors as a class but lapses and goes to the testator's next of kin.

ACTION for the construction of a will. The facts sufficiently appear in the opinion.

Burr & Davidson (Clarence L. Barber, of counsel), for plaintiff.

Remsen & Parsons, for Westchester Trust Company.

Forster, Hotaling & Klenke (Wm. G. Choate & George A. Hotaling, of counsel), for Louis V. Sone.

Sidney Ward, in person and for Barker, executor.

Mannice, Abbott & Perry (Everett V. Abbott, of counsel), for Catherine C. K. Hagen.

TRUAX, J. Francis C. Flemming made his will in 1880. At that time his father, Thomas Flemming, his mother, Frances A. Flemming, his brothers, Walter Flemming and Henry Flemming, and his sister, Anna Flemming Kimball, were living. He provided

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in his will that the executors therein named should convert all his property into money, and that the executors should purchase $50,000 of bonds and hold them in trust during the life of one Mary F. Cowie, she to receive the income thereof during her life, and after the death of the said Mary F. Cowie the testator bequeathed the $50,000 of bonds so to be purchased to his sister, Anna Flemming Kimball and his two brothers, Walter and Henry Flemming, to be equally divided between the three, share and share alike. The testator gave, devised and bequeathed the rest, residue and remainder of his estate real and personal in trust to his executors who were to pay the income of said estate to the testator's father and mother in equal proportions during their lives, and, after the death of either, to pay to the survivor the whole of said income derived from such residue during the life of such survivor. And on the death of both father and mother he gave all the said estate to his sister, Anna Flemming Kimball, and to his brothers, Walter Flemming and Henry Flemming, their heirs and assigns, to be equally divided between them, share and share alike. The above-named Walter Flemming died before the testator, Francis C. Flemming, and when the testator died his father and mother and his brother Henry, and sister, Anna, were living, The question to be determined here is, did the testator die intestate as to the one-third of the estate bequeathed to his brother Walter Flemming, or did it go to the survivors, Anna Flemming Kimball and Henry Flemming, share and share alike. I am of the opinion that said Francis C. Flemming died intestate as to the one-third of the estate bequeathed to his brother Walter Flemming. Savage v. Burnham, 17 N. Y. 561; Beekman v. Bonsor, 23 id. 298; Downing v. Marshall, id. 366; Everitt v. Everitt, 29 id. 39; Embury v. Sheldon, 68 id. 227; Stevenson v. Lesley, 70 id. 512; Monarque v. Monarque, 80 id. 320; Delafield v. Shipman, 103 id. 463; Matter of Wells, 113 id. 396; Hard v. Ashley, 117 id. 606; Matter of Seebeck, 140 id. 241; Matter of Kimberly, 150 id. 90; Moffett v. Elmendorf, 152 id. 475; Matter of Brown, 154 id. 313; Matter of Russell, 168 id. 169.

In Matter of Russell, 168 N. Y. 169, the testator, James Russell, gave, devised and bequeathed to his wife and children all the rest, residue and remainder of his estate to be divided equally between them, share and share alike, that is to say to his wife one share and to each child an equal share with his wife. He died

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leaving behind him surviving, his widow and five children. One of his children married one James K. Black and died thereafter without issue and intestate. The question before the Court of Appeals in the case above cited was what disposition should be made of the share of the residuary estate of the child so dying, and it was held that the devisees did not take as a class, but that each took distributively.

In Moffett v. Elmendorf, 152 N. Y. 475, the devise was "to my aunt, Catherine Elwell, and my cousins, Mary S. Elmendorf, John D. Elwell (and others) each to take an equal share therein," it was held that the beneficiaries took distributively and not collectively, and that the lapsed devises went into the residuum of the estate and not to the survivors. In Matter of Kimberly, 150 N. Y. 90, the testator gave, devised and bequeathed all his estate, real and personal, of whatsoever kind, wheresoever situated, unto his three sisters, Mary, Annie, and Louisa. Mary died before the testator died. It was held that the words above mentioned constituted, by force of the statute (1 R. S. 727, § 44), a tenancy in common and not a joint tenancy or a bequest to a class. It was also further held that the statute above referred to applied to personal as well as real estate. Mr. Justice Martin, in writing the opinion of the court, said: "The canon of interpretation to the effect that if there are two modes of interpreting a will, that is to be preferred which will prevent total or partial intestacy, has no application here. The statutes and decisions are controlling and cannot be changed or rendered nugatory by any mere rule of construction." And to the same effect are the other cases above cited. I am of the opinion that one-third of the estate of Francis C. Flemming lapsed, and that Thomas Flemming, the father of Francis C. Flemming, took the said one-third of said Francis C. Flemming's estate as the sole next of kin of said Francis C. Flemming.

While the agreement of February ninth is an agreement to convey all the interest of Mrs. Skinner in the estate of Thomas Flemming it did not convey. All that was in fact done by the parties to the agreement of February ninth is shown by the receipt signed by Mrs. Sutherland a few days after the execution of the agreement of February ninth in which receipt Mrs. Sutherland uses the following language: "The foregoing being all the properties and assets agreed to be transferred or conveyed to me by the said Frances A. Skinner under the agreement bearing date February

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9, 1893, after the payment of costs and counsel fees and the debt due from the estate of Thomas Flemming to the estate of Francis C. Flemming." This was the instrument that closed the transaction, and, if there was any ambiguity in the agreement of February ninth it was resolved by this receipt. It is also to be noticed that the instrument of February ninth makes no reference to the interest of Mrs. Skinner in the principal of the estate of Francis C. Skinner while it does specify with great definiteness the property which it intended to transfer. For the reasons above stated I am of the opinion and I decide that the interest given and devised to Walter Flemming by Francis C. Flemming lapsed by the death of the said Walter Flemming prior to the death of the said Francis C. Flemming and passed into the residuary estate of said Francis C Flemming; that on the death of the said Francis C. Flemming his father, Thomas Flemming, succeeded to that interest as in cases of intestacy; that such interest is now owned by the plaintiff in this action; that as to the personal property the defendant, The Westchester Trust Company, should account to plaintiff as owner of one-sixth thereof except the corpus of the fund of $50,000, the income of which was to be paid to Mary F. Cowie during her natural life; that as to that fund the plaintiff has a vested estate in remainder to such portion thereof as passed on the death of the said Francis C. Flemming to Thomas Flemming; that as to the real estate the plaintiff has a vested estate in fee of one-half of that portion that was devised to Walter Flemming, and that the plaintiff is entitled to costs and an extra allowance, payable out of the estate.

Ordered accordingly.

ROBERT M. S. PUTNAM, Plaintiff, *v.* THE LINCOLN SAFE DEPOSIT COMPANY et al., Defendants.

(Supreme Court, St. Lawrence Special Term, February, 1903.)

Trust — Beneficiary dealing with the corpus — Written statement of the trustee, as to the corpus, binding the beneficiary.

After a foreign will had been declared, in an action in the proper foreign court, to establish, in the husband of a child of the testator, a valid active trust for her benefit and that of her children, with

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remainder to them in fee after her death, the husband and wife, residents of the State of New York, ignored the trust, dealt with the corpus as if presently belonging to the wife and the children and as if he were its manager, soon put many trust securities in her name, bought with trust moneys new securities running in her name, kept a joint bank account and had equal access to the trust securities, which were kept in a box of the defendant depositary. After his death, which preceded hers by about ten months, a statement of his account as trustee was found in his safe and this showed the amount of the corpus, that his commissions and expenses had been paid, and that old and new securities, kept in said box, belonged to the trust. The box also contained a note given by her to him as trustee which balanced the account.

Held, that the statement was competent evidence against her and her estate to show the true ownership of the securities found in the box and that it was not excluded by Code C. P., § 829.

MOTION to confirm the report of a referee. John R. Putnam, the trustee, died November 28, 1899, and his wife died September 30, 1900.

Albert Stickney & Otto C. Wierum, Jr., for plaintiff.

Samuel Hoff, for Safe Deposit Company.

Edgar T. Brackett and Nash Rockwood, for defendant, John R. Putnam.

C. H. Sturges, in person and for Israel Putnam.

Corliss Sheldon, for administrator of John R. Putnam.

KELLOGG, J. M., J. The interlocutory judgment herein (34 Misc. Rep. 333, 66 App. Div. 136) establishes that Judge Putnam was trustee for his wife and her children under the will of Robert M. Shoemaker, his wife's father, and the only question here is to determine whether certain property belonged to Mrs. Putnam, and goes by her will to one of her sons, or belonged to the trust estate and goes under her father's will to her three sons. The referee has found the property belongs to the trust estate. No persons are interested in the question except the three sons. The report of the referee is so full and convincing as to his reasons that it

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is necessary to say but little in addition to it. The will in question was an Ohio will, and notwithstanding the fact that the Ohio courts had decided before this property came to Justice Putnam that there was a valid trust, and that he took title as trustee, it is evident that Judge Putnam acted in the administration of the estate to quite an extent in the belief that there was no legal trust and that he was simply the manager of the estate for the benefit of his wife and that the children were to have what was left of it at her death. From the answer of Mrs. Putnam and the conduct of the estate it is evident that she also took this same view of the situation. Mrs. Putnam survived her husband but a very short time, and consequently this case rests to quite an extent upon inferences to be drawn from the few facts which are established. We find almost immediately after the receipt of the trust property a box in the defendant Safe Deposit Company's vault is rented in the name of John R., or Mary S. Putnam, to which box both of said parties had free access at all times, and in this box most of the securities in question were found. Almost immediately after the receipt of the trust property a bank account is opened in the name of John R. or Mary S. Putnam, in which the trust income, his salary as justice, and her small private income as well as his small private income are deposited, and also moneys received at different times from a sale of trust securities. This account was checked upon by either party at will for personal, housekeeping, investment or other purposes. No other bank account was used for the trust estate or by either of the parties except until about May, 1888, a small account was kept by J. R. Putnam as attorney. After the commencement of this action there was found in this safe deposit box about $70,200 in securities, mostly certificates of corporate stocks registered in the name of Mary S. Putnam, which from the identity in amount and name of each security are easily identified as the same securities which were received by the trustee from the Shoemaker estate. The coupon bonds remained in the same condition in which they were received by the trustee. The registered bonds had been changed to the name of Mary S. Putnam. The certificate, representing a large amount of these stocks, was issued in the name of Mary S. Putnam, November 1, 1887, almost immediately after the trustee received them. We also find in this box new securities standing in her name to

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the amount of $64,890. Some real estate, concededly the property of the trust, was transferred from the name of the trustee to that of his wife. An account-book is found, evidently containing many accounts with various persons before Judge Putnam became trustee. And here is found an account in the name of John R. Putnam, trustee, in which he entered the receipts of income from the trust, his salary as justice, her small personal income and his private income. The pages torn from this book deprive us of a part of this account, and also of his inventory of the trust property, which from the index we infer was upon some leaves which have been torn out. It is possible this account, if inviolate, might have shown a sale of the trust securities and other valuable information. Just before Judge and Mrs. Putnam were about to take an ocean voyage, for his health, and from which he did not return, he prepared a statement of the trust fund (Exhibit 27) and left it in his safe, together with a note given by his wife to him as trustee for $36,987. The amount of this note just balances the account as he made it. The note is found with the account, and it is not quite clear whether her will accompanied them or not. This statement shows that the original securities standing in the name of Mary S. Putnam in the safe deposit box are a part of the trust estate, and also that the new securities found in said box have been purchased to take the place of trust securities which had been sold. The statement charges him with the securities received from the Shoemaker estate, shows that his commissions and expenses have been paid and that these securities are the trust securities. This statement is absolutely conclusive in this case if it is evidence against Mrs. Putnam and her estate. Judge Putnam had particular knowledge of all the facts stated. In charging himself with over $200,000 of securities and acknowledging payment of his expenses and commissions, the statement was a declaration against his interest and thus became evidence for what it is worth as to all parties and all its contents. Steph. Ev., art. 28. The facts in this case verify and confirm the contents of that statement. Mrs. Putnam has put herself in a position with reference to this trust estate that makes it easy for a court of equity to determine what constitutes the trust fund so far as she and her estate are concerned. She is certainly chargeable with knowledge of the trust; that the securities of the trust practically all stand

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in her name, and began at least to be changed to her name within two months after the trustee received them, and that those payable to bearer were with the others in a box in which she was joint lessee and to which she had free access. The dividend checks upon the securities standing in her name must have been payable to her order, and she must have known that she had not property of her own sufficient to produce such an income. The bank account in her name, and upon which she checked, and in which her private income, though small, was kept, charges her with general knowledge of its condition from time to time. It does not appear that at the time the box in the safe deposit company was rented she had any securities of her own to put there; neither does it appear that any securities concededly the private property either of herself or Judge Putnam were ever placed in this box. It is not unreasonable to assume that the other securities which were not found were transferred to her at about the time the transfers began to be so made, and if so they could be sold only with her consent and under her signature. Here, where her connection with the trust estate has been such that she was at least called upon to explain her connection with it and from what source she derived this large amount of property standing in her name, it does not appear that at the time of her death Judge Putnam's estate, or that she herself owned any property of any considerable value aside from Putnam place, which was concededly her property during all the time. It is not reasonable to suppose that Judge Putnam has managed the trust estate so badly that he lost the greater part of it, but managed his wife's business so successfully that she made about what the trust estate lost. For it is a fair inference from the evidence that he purchased these new securities and had them registered in her name, and it does not appear that she carried on any business, or had any private sources of income aside from what she received from this estate. Neither does it appear from the evidence that any particular part of the trust estate was lost by bad investments or otherwise. The referee finds some losses, but those are on securities which are actually found but which the referee determines should have been sold. We cannot assume that this trustee has deliberately used for his own private purposes this trust estate and thus become guilty of a deliberate intentional breach of trust, but it is a better means of

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accounting for the securities to say, as Judge Putnam said in the statement in evidence, that the trust securities are the securities found in the box in the joint possession of himself and wife, and that this joint possession and the transfer of the securities to her name arises from the fact of the wrong construction which both he and his wife put upon the provisions of the will. The acts of both of them are more consistent if viewed in that light.

It is undoubtedly the law that the fact that securities stand in the name of a party is evidence that he is the owner, but when we remember that Judge Putnam and Mrs. Putnam put the known trust securities in her name and seem to have selected that name as the name in which to put the trust securities, the fact that the securities stand in her name is of but very little importance in a question between her and the trust estate as to their ownership. They were as much in his possession as in hers, and the new securities were as much in his control as the old securities were which undoubtedly belonged to the trust. Her evidence of title to the one is as good as to the other, so far as the place in which they were found and the name in which they stand are concerned. The giving of her note to the trust for the deficiency in the trust fund is in the line with their joint control and use of the trust. And that fact, and the way in which this husband and wife managed this trust property, lead to the conclusion that she is fairly chargeable with the knowledge of the contents of the statement Exhibit No. 27, and that that exhibit states the facts as they both understood them.

But it is most seriously contended that the Delaware and Hudson Canal Company stock of the stated value of $35,960, and now of greater value, found in the safe deposit box standing in the name of Mrs. Putnam, was purchased with money actually belonging to her. It seems that when Putnam place burned the $25,000 insurance money concededly hers was deposited in this bank account and used by him in purchasing in her name New York Central stock, and that it is probable that the proceeds of that stock deposited in this bank account produced the particular fund which bought this Delaware and Hudson Canal Company stock. It also appears that after the purchase and before the sale of this New York Central stock Putnam place was rebuilt at an expense of upwards of $25,000, and the expenses thereof were

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paid from this same bank account. The referee finds that equity is satisfied by treating this Delaware and Hudson and other new stocks as substitutes to make up the corpus of the estate and that no charge should therefore be made upon Putnam place for the moneys spent in rebuilding it. His conclusion is right, but it may be also said that it is unnecessary to trace particular moneys and the use of them so long as there is a deficiency in the corpus of the estate arising from the way in which it was administered. Equity will not allow to Mrs. Putnam the rebuilt house and the securities bought with the insurance moneys under the circumstances of this case. The trust certainly should be allowed to keep the money from the New York Central stock to replace the money used in rebuilding Putnam place. The estate of Mrs. Putnam is called upon to follow this bank account further. By her dealings she has so complicated and involved the trust estate that she rather than the *cestui que trust* may properly be charged with proving whose money any particular money found in this bank account was, especially as by placing the known trust securities in her name she cannot rely upon the presumption, which might otherwise apply, that the securities in her name are hers. Whether this money deposited in this account which went to buy the New York Central stock or the Delaware and Hudson Canal stock was actually hers, or the trust's or Judge Putnam's, depended upon the actual state of the accounts of each with the trust. The moment it went into the general bank account it was such a commingling of trust and individual funds that it lost its identity, and before either individual could claim it as against the trust it should appear that his or her account with the trust is such that it is not needed to make up the deficiency in the trust fund. It may have taken all of this deposit of insurance money, or the money from the New York Central stock, to make up trust funds which had previously been used by Mrs. Putnam from this same account, or of securities taken by her consent or act from the trust fund.

It is contended that the statement of Judge Putnam, Exhibit No. 27, is inadmissible under section 829 of the Code of Civil Procedure, as Judge Putnam, if living, would be an incompetent witness against her estate. But this statement was made when both were living, and if admissible in evidence its competency should properly be determined as of that time. Moreover the

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receipt of such a statement is not "being examined as a witness" within the meaning of that section. Lyon v. Ricker, 141 N. Y. 225, 231; Matter of Callister, 153 id. 294, 305–307.

Nor does any party here derive any interest from Judge Putnam; the interest comes from the Shoemaker will. Neither is the evidence of the Shoemaker executors as to what funds they turned over to Judge Putnam inadmissible under section 829. They are not interested in the event of this action. Eisenlord v. Clum, 126 N. Y. 552.

The referee has properly charged the trustee with the losses on some bank stock and some railroad income bonds. While those securities came to him with the trust, he was a high judicial officer, familiar with the law, and his retaining them until they became worthless is unexplained aside from the fact that it is probable that his peculiar construction of the will that these were more private than trust funds may have been the reason for such retention. This was certainly an erroneous and unjustifiable view of the situation, for the courts of Ohio had determined, in an action to which he was a party and before he received the property, that he was to receive it as trustee.

It is contended that the proceedings in the Court of Ordinary in Georgia by which the Atlantic Factory stock and the Sibley Manufacturing Company stock were divided in kind as undevised real estate, is an adjudication that such property was real estate and was not a part of the trust fund, and is binding upon this court, and that the referee has erred in treating those stocks as trust property. The proceedings in Georgia were apparently by consent and the *cestuis que trustent* were not parties. The proceedings do not allege that the principal property or investments of the companies were in real estate which was necessary to make the stock real estate under the Georgia law, and from the Georgia statute in evidence it appears that such stocks "may be transferred from one person to another for any purpose whatsoever by the same means as are or may be allowed by law for the transfer of personal property." It is therefore evident the title to this stock passed by the Shoemaker will, although it did not have three witnesses as required by the law of Georgia for the transfer of real estate. We therefore view this proceeding in Georgia as a proceeding taken by consent as a convenient means of getting possession, by the trustee and the other lega-

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tees under the Shoemaker will, of this factory stock and as not a binding decision upon the parties to this action. This was evidently the view of both Judge and Mrs. Putnam, as the stocks when received were treated in the same manner as the other trust securities.

A careful consideration of the other questions raised does not affect the validity of the findings of the referee, and the referee's report, except so far as has been changed in some matters of detail by the court, is approved, and an order should be entered confirming said report and for final judgment thereon. An additional allowance of $2,000 is granted to the plaintiff, an additional allowance of $1,750 is allowed to the defendant John R. Putnam. Such allowances and taxable costs to be charged against the defendant Israel Putnam, Corliss Sheldon, as administrator of John R. Putnam, and C. H. Sturges, as executor of Mary S. Putnam. Costs and an additional allowance of $250 allowed the defendant the Lincoln Safe Deposit Company, same to be payable from the trust fund before division.

Ordered accordingly.

WILLIAM ROCKEFELLER and JOHN P. KELLAS, Plaintiffs, *v.* THE ST. REGIS PAPER COMPANY, Defendant. (Action No. 1.)

WILLIAM ROCKEFELLER and JOHN P. KELLAS, Plaintiffs, *v.* THE ST. REGIS PAPER COMPANY, Defendant. (Action No. 2.)

(Supreme Court, St. Lawrence Special Term, February, 1903.)

Contract — Relief from a mistake made in splitting an entire demand.

Where a dispute has arisen, under a contract permitting a corporation to cut timber from lands, as to the amount cut up to Oct. 1, and the owners of the lands sue the corporation, on Dec. 22, for the value of so much timber as they allege had been cut up to Oct. 1, and recover judgment therefor without a contest, the court will, on their motion, vacate the judgment and consolidate a second action, brought by them, after Dec. 22, for the value of the timber cut by the corporation on the same lands in Oct. and Nov., to the end that the judgment in the first action may not be a bar to the second action — it appearing that the plaintiffs supposed, when they brought the first action, on Dec. 22, at a time when payment was also due for the tim-

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ber cut in Oct. and Nov., that there was no dispute as to the amount of that timber and that the corporation would pay for it without any controversy.

MOTION to vacate and set aside the judgment in action No. 1 and to consolidate the two actions into action No. 1.

John W. Geneway .(Thomas Cantwell, of counsel), for plaintiffs.

Henry Purcell and Elon R. Brown, for defendant.

KELLOGG, J. M., J. This is a motion to vacate and set aside the judgment in action No. 1 and consolidate the two actions into action No. 1. Action No. 1 was brought to recover of the defendant the amount due the plaintiffs upon a contract for timber cut and removed from their land in the amount of $5,030, being for the cuttings and the payments due to October 1, 1902. The action was brought December 22, 1902, after a dispute had arisen as to the amount of cutting and the amount due plaintiffs to October 1. The defendant appeared in said action December 26, 1902, and offered judgment for $3,768.55, December 28. No answer being interposed judgment was entered for the plaintiffs, January 15, 1903, for $5,115.22, which judgment was paid to the sheriff January 19, 1903, and the execution duly returned satisfied. Action No. 2 was begun January 9, 1903, to recover for the cutting during the months of October and November, being the payments due on said contract up to December 1, 1902. On the 27th day of January, 1903, the defendant answered in action No. 2, setting up the judgment in action No. 1 and payment of the execution in bar of the plaintiffs' claim. It is apparent that both actions are brought to recover the moneys due upon the same written instrument, and all the moneys sought to be recovered in actions No. 1 and No. 2 were in fact due and payable when action No. 1 was brought. It would seem that action No. 1, with the recovery therein and execution satisfied, would be a complete bar to action No. 2. Jex v. Jacob, 19 Hun, 105; O'Beirne v. Lloyd, 43 N. Y. 248; Lorillard v. Clyde, 122 id. 41, 45.

While the moving papers do not concede that fact, and assume that this motion is made for the purpose of preventing de-

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lay, there being no other defense to the recovery sought in action No. 2, the real basis of the motion is the assumption that the proceedings in action No. 1 is a defense in the second action. The defendant contends that there is no mistake or fraud, or inadvertence, which justify this motion; that one of the plaintiffs is a prominent attorney, learned in the law, and that he did, in the splitting of this demand and the bringing of the two actions, just what he intended to do, and that therefore no relief can or should be granted him. The only real excuse offered by the plaintiffs for the situation is that there was an honest dispute as to the cutting and the amount due up to October 1, and that said first action was brought to settle that dispute, but that up to that time no discussion had been raised, or in fact ever was raised, as to the cutting sought to be recovered for in action No. 2, or the amount due therefor, but that, after the first action was begun, correspondence began as to the October and November cutting and the defendant simply delayed paying, and finally upon January 9 this second action was brought; and the October and November cuttings were not embraced in the first action, as plaintiffs assumed they would be paid for without controversy and that action was unnecessary.

This is not a case where a party elects between remedies which are in themselves inconsistent, so that, in choosing one remedy, he voluntarily abandons the other, and where such election once made is conclusive upon him forever, as, for instance, where a sale of goods is induced by fraud, and plaintiff, with the knowledge of the facts, elects to sue for the contract price and thereby affirmatively waives the right to retake the goods, or where a party whose goods are wrongfully converted waives the tort and sues for the purchase price upon an implied contract of sale. McNutt v. Hilkins, 80 Hun, 235. But the defense in action No. 2 is that the plaintiff has split an entire demand, and that but one action can be brought upon the same cause of action. While that is a complete legal defense while the judgment stands, it is still in the province of a court of equity to relieve the party who has made such a mistake rather than forfeit the balance of his claim. And this motion is a proper method for such relief.

In Jex v. Jacob, *supra*, the plaintiff demurred to an answer setting up a prior judgment under facts somewhat analogous to those at bar, and the demurrer was overruled, but without preju-

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dice to the right to apply at Special Term to vacate the former judgment, recognizing that as the only and proper remedy for the plaintiff to pursue. It is true that upon that motion, made at the Special Term of the New York Common Pleas, 7 Abb. N. C. 460, the motion was denied and the court seemed to think that after a party had made a choice he should not be allowed to revoke it. But the fact remains that that decision was really placed upon the ground that more than a year had elapsed before the motion was made, and it was therefore too late under section 1882 of the Code, and also upon the ground that by plaintiff's delay and other proceedings in the action after the defense was interposed, the defendant had altered his position in the matter and that furnished a reason for not granting the motion. We do not consider that case, in the Common Pleas, as any authority against the plaintiffs' position in this case. Hatch v. Central National Bank, 78 N. Y. 487; Shaw v. Broadbent, 129 id. 114, 124.

Here, unless such relief is granted to the plaintiffs, they lose $26,251.21, which, so far as appears before the court, is justly due them, and should be paid by the defendant, aside from this technical objection. It would therefore seem that the power of this court should be exercised to relieve the plaintiffs from their mistake. An order will therefore enter vacating and setting aside the judgment and execution in action No. 1 upon the return of the money paid by the defendant, with interest thereon, or in case of its refusal to accept the same, that it be paid into court for its benefit, and consolidating the said two actions into action No. 1, and authorizing an amended pleading to be served, the plaintiffs to pay ten dollars costs of this motion and fifty dollars costs and allowance in said action.

Ordered accordingly.

JOHN H. WALKER, Plaintiff, *v.* J. FRANK HARDER, as Sheriff of St. Lawrence County, Defendant.

(Supreme Court, St. Lawrence Trial Term, February, 1903.)

Escape — Effect of the prisoner's discharge in bankruptcy — Sheriff.

Where a debtor, held by a sheriff within the liberties of a jail upon a body execution on a debt provable in bankruptcy, files a petition

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therein, procures a discharge and thereupon, of his own motion, goes and remains beyond the liberties, the sheriff is not liable to the creditor in the execution as for an escape.

ACTION against the sheriff of St. Lawrence county as for an escape.

Abbott & Dolan, for plaintiff.

George H. Bowers, for defendant.

KELLOGG, J. M., J. One Hendrick, who was held within the liberties of the defendant's jail, upon a body execution by the defendant sheriff, filed a petition in bankruptcy, and thereafter, in due proceedings had, obtained his discharge in bankruptcy, and thereupon, without the consent of the plaintiff or the defendant, went beyond the said liberties and has not returned, and this action is brought against the sheriff as for an escape. While the defendant did not discharge the imprisoned debtor, nevertheless if the debtor was entitled to his discharge that is a complete defense to the defendant. Richmond v. Prain, 24 Hun, 579.

We do not find that this question has ever been passed upon directly by the courts. In Maas v. O'Brien, 14 Hun, 95, where the debtor escaping from the limits had been adjudged a bankrupt and was legally entitled to his discharge, but had never applied for it, a verdict for the amount of the execution was set aside, the court saying that in any event only nominal damages could be recovered, and that if the bankrupt was entitled to his discharge the plaintiff was not entitled to recover. But when that case was decided the absolute irresponsibility of the judgment debtor was a fact mitigating damages, and that rule, so far as it applies to this case, has been changed by the Code of Civil Procedure, section 158. But so far as that case holds that the plaintiff was not entitled to recover at all, it tends to show that a discharge in bankruptcy is a complete defense.

It is conceded here that the plaintiff's judgment was a debt provable in bankruptcy, and which, under section 1268 of the Code of Civil Procedure, after a year had elapsed from the time of said discharge, might be discharged of record unless the fact

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of the judgment debtor's imprisonment at the time of the petition and discharge would otherwise prevent. It is urged by the plaintiff that the judgment remained in full force so far as the imprisonment of the judgment debtor is concerned, and that the discharge in bankruptcy does not become complete as to said judgment until a year after it is granted. Code Civ. Pro., § 1268. We cannot agree with this position. The Bankrupt Law makes the discharge a complete release of all provable debts as soon as granted. The proceeding under that section of the Code to cancel the judgment of record is intended merely to remove from the record the extinct judgment where it otherwise might remain to the annoyance or prejudice of the discharged debtor, or others.

A sound public policy will not recognize that one citizen has a lien upon another, and that therefore this plaintiff had some right or control over the person of the said Hendrick which would make the plaintiff a secured creditor within the meaning of the Bankrupt Law. While the judgment debtor is imprisoned, such imprisonment is resorted to as a remedy to enforce the collection of the debt, which under the circumstances of its origin the law deems the debtor under more than ordinary obligation to discharge. As the imprisonment of the debtor is only a means to compel him to pay the judgment, it must follow that, when the debt or judgment is discharged and all legal obligation of the debtor absolved, there is no further reason for detaining him in prison. The object of the Bankrupt Law is remedial in its nature, to bring about a just distribution of the debtor's property among his creditors and to relieve unfortunate debtors from their debts and thus enable them to engage in business and become useful citizens. It would be a mere mockery to hold that the law frees the debtor from the legal obligation to pay the debt, but retains his person in prison until he pays that which he is under no legal liability to pay.

It cannot be that the fact that the debtor is imprisoned at the time the petition in bankruptcy is filed renders the judgment upon which he is imprisoned a debt not provable within the meaning of the Bankrupt Law. It is true that while the debtor is so in prison no execution against his property may issue, and all other rights of the creditor against the debtor for the collection of the debt are suspended, the imprisonment being deemed a

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temporary satisfaction, and that unless the debtor dies in jail, the creditor consents to his release or he is released by provisions of law, the creditor can have no other affirmative means of collecting the debt. Koenig v. Steckel, 58 N. Y. 475.

It may be that the imprisonment of the debtor is so far a temporary satisfaction of the debt that the judgment creditor could not, as a means of collecting his debt, be a petitioner to force the debtor into bankruptcy, but here the debtor himself pursues a remedy, namely the proceeding in bankruptcy, to get rid of his debt. The fact that the creditor is having a temporary satisfaction of his judgment by the imprisonment of the debtor and therefore cannot take other affirmative proceedings to collect his debt, does not deprive the debtor himself, who is in prison, from taking such affirmative and aggressive means to obtain release from his debts or imprisonment as he may deem proper. Pinckney v. Hegeman, 53 N. Y. 31. The debtor therefore had the right to file the petition in bankruptcy, and this debt not being a secured one was provable in bankruptcy and is consequently discharged. The judgment being discharged there was no warrant for keeping the judgment debtor in jail, and for his escape the defendant is not liable. The plaintiff has suffered no pecuniary loss by reason of the fact that Hendrick left the jail liberties, as Hendrick was not legally indebted to him. Formerly an imprisoned debtor discharged under the Two-Thirds Act could apply to the court for his discharge from imprisonment. Pinckney v. Hegeman, 53 N. Y. 31. But under the provisions of the Code of Civil Procedure, where an imprisoned debtor is discharged under the State Insolvent Law, the sheriff must discharge him upon being furnished a certified copy of the discharge. Code Civ. Pro., § 2185. It would seem that a similar practice in case of a discharge in bankruptcy is both reasonable and proper.

The defendant is therefore entitled to judgment for a dismissal of the complaint, with costs.

Judgment for defendant for a dismissal of complaint, with costs.

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Matter of the Judicial Settlement of the Account of JOHN H. COLLINS and SADIE E. FEIERABEND, as Administrators, etc., of DANIEL M. COLLINS, Deceased.

(Surrogate's Court, Kings County, February, 1903.)

Contempt — Civil — Release of offender refused — Code C. P., § 2286 — Adjudicated a bankrupt.

A person imprisoned for a civil contempt, in having failed to comply with a surrogate's decree directing him to pay a sum of money representing his *devastavit* of an estate of which he had been an administrator, should not be discharged, under Code C. P., § 2286, upon his uncorroborated statement that he is unable to pay the sum where it appears that the surrogate's decision also found him guilty of fraud and perjury, and that he fled from the jurisdiction upon the day before the decree was entered upon the decision and remained away for some time.

His having been adjudicated a bankrupt affords no reason why he should be discharged from imprisonment.

APPLICATION by one of the administrators of decedent's estate to be released from imprisonment, under an order of this court, on October 23, 1902.

Hamilton & Beckett, for administratrix Sadie E. Feierabend.

James W. Ridgway, for John H. Collins.

CHURCH, S. This is an application by John H. Collins, one of the administrators of the decedent's estate, to be released from imprisonment under an order and warrant of this court on October 23, 1902, by which he was adjudged guilty of a contempt; on the ground that he is unable to pay the fine imposed.

This is the sole ground alleged in the motion papers, and upon the argument of the motion the counsel for the prisoner claimed that it was solely on account of his inability to pay the fine that the motion was made. The answering affidavit filed by the prisoner, however, contains some allegations with reference to his ill-health. As this stands absolutely uncorroborated, and is contrary to the express avowal of his counsel, it will be pre-

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sumed that it is not urged as a ground for the granting of this motion.

The statement of the prisoner that he is unable to pay any money is uncorroborated, and consists solely in the allegation that on September third he received $5,000 from the sale of certain property; that he lost this sum of money on the race tracks, and that at the time that he was imprisoned he had but $200, which sum he has since expended.

The circumstances which led up to the decree directing Collins to pay this money are fully reported in the Matter of Feierabend, 38 Misc. Rep. 524.

The prisoner's explanation, as given above, is disingenuous, the real facts being that the prisoner, after the above decision, continued the business until the day before he knew the decree was likely to be entered, when he sold out this entire property, and fled from the jurisdiction of the court until a few days before the contempt papers were issued herein.

The provisions of the section of the Code in question (§ 2286) seem to me to be intended to apply to a person who has been directed to pay a sum of money, and who is unable to do so by reason of business misfortunes or some other proper reason, and it does not seem to me that it was intended that the discretion and clemency of the court were intended to be extended to a person who, in anticipation of a judgment of the court, deliberately flees from the jurisdiction of the court, after conducting a fraudulent sale, the obvious intention of which was to nullify the effect of any decree which the court might make. The prisoner therefore does not stand in any position to claim sympathy from the court, and the motion might well be denied on this ground alone.

But the papers in the case do not satisfy me that the prisoner has no money, and is unable to pay the debt in question, which is, by this section of the Code, a prerequisite to the granting of the motion.

By the decision in this case it was found that Collins was guilty, not alone of misconduct as an administrator, but of actual fraud and perjury, and his conduct in fleeing from the jurisdiction of the court was a tacit admission that these findings were correct. With this reputation for truth and veracity, therefore, there should be something else submitted to the court beyond

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his unsupported word to justify its receiving any credence. In opposition, it appears by the affidavit of detective-sergeant Stephen A. Donlon, and also by the affidavit of one J. Edward Orr, a private detective, that at the time that Collins was arrested he stated that he had "$10,000 put away," and that "these people," evidently referring to his creditors, "could go dig for it;" he also stated that instead of losing money on the race track that he had actually made some. Counsel for the prisoner tries to explain away this evidence by the contention that the evidence of a detective is worth nothing. It is true that under certain circumstances the evidence of a detective should be carefully scrutinized, but there is no principle of law or justice which permits a court, or anybody else, to disregard statements of a detective. The detectives in question are reputable persons, conducting not only a legitimate, but a very proper and necessary business for the protection of the community, and neither their evidence nor their conduct has, at any time, been the subject of adverse criticism. The particular statements in question did not go to the merits of the matter which they had under advisement, and I believe their statements that Mr. Collins made these remarks.

I can readily understand that a man who is a fugitive from justice, and occupies the position which this man Collins did, would be perfectly willing to submit to a short term of imprisonment, if he might, by so doing, retain his ill-gotten gains.

He pleads that he has been adjudged a bankrupt. This is no reason why this motion should be granted; on the contrary it seems to me that it rather tends to corroborate the theory that being adjudged a bankrupt he would be free from the payment of any of his old debts, and if he could serve a short term of imprisonment, and get released under a motion of this kind, that then he would be entitled to hold this money absolutely beyond the reach of any one.

The circumstances in this case are not nearly as favorable for the prisoner as those in the Matter of Steinert, 29 Hun, 301, and in that case it was held that the prisoner should not be discharged.

It, therefore, seems to me that to discharge this man would be unwarranted.

Motion denied.

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Matter of the Judicial Settlement of the Account of CHARLES BECKER, ALBERT J. KELTING, HERBERT LIPS, and DIEDERICH EILERS, as Executors of the Last Will and Testament of ANTON EILERS, Deceased.

(Surrogate's Court, Kings County, February, 1903.)

Legacy — Dependent upon the time of, but not upon continuous, service — Legacies, when cumulative.

The will of a testator gave to each of his employees who had, at his decease, been employed "as long as two years, and less than five years", $500, and to each one who had been employed "for less than a period of two years", $100.

Held, that one who had been employed continuously, before the testator's death, for only sixteen months but who had, counting various times of service, been employed for four years in all, was entitled to $500.

A person mentioned in a will as entitled to a specific sum and who is also named therein as one of a class of legatees is entitled to take both legacies.

PROCEEDINGS upon the judicial settlement of the account of executors. Objections to accounts.

Smith & Bowman (Artemus B. Smith, of counsel), for executors.

De Witt, Lockman & De Witt, for George E. Bright, contestant.

Wilmot L. Moorehouse, for Henry Moeller, contestant.

CHURCH, S. To the settlement of the executors' accounts objections are made by George E. Bright and Henry Moeller, two legatees under the will, each of whom contends that the executors have not paid him the amount to which he is entitled as a legatee.

The legatee George E. Bright was, at the time of the testator's death, in the employ of the Eilers & Becker Leather Company, in which the testator was largely interested.

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The will of the testator contained the following provisions: "It is my will and I do hereby direct my executors, as soon as conveniently may be after my decease, to make payments of money to the employees of the Eilers & Becker Leather Company, who shall at the time of my decease be in the employment of said Company as follows:

"To each and every such employee who shall have then been in the employment of the Eilers & Movius Leather Company and the Eilers & Becker Leather Company, for the period of five years, the sum of one thousand dollars. ($1,000.)

"To each and every of such employees who shall have been in the employment of the Eilers & Movius Leather Company, as long as two years, and less than five years, the sum of five hundred dollars ($500.)

"To each and every such employee who shall then have been in the employment of the Eilers & Movius Leather Company and the Eilers & Becker Leather Company, for less than a period of two years, the sum of one hundred dollars."

It appears that Mr. Bright was in the employ of the company at the time of the testator's death, and that he had been so employed continuously for one year, four months and five days; that he had been in such employ at three separate periods, the aggregate of the time of which exceeded two years, being four years and a fraction thereof.

The executors therefore contend that Mr. Bright should come within the third class of employees and receive the sum of $100, on the ground that his employment should have been continuous, while, on the other hand, Mr. Bright contends that he comes within the second class, and is therefore entitled to the payment of $500.

There is no authority which I can find directly applicable to the circumstances of the present case.

The general definition of the word "period," in reference to time, is to refer to a continuous period, and the question is, therefore, whether the testator in using the expression "period" intended to give it any such definition, or whether he simply meant to refer to term of employment. While there is little from which the intent of the testator can be drawn upon this subject, yet it is evident that the desire of the testator was to recognize the persons who were in his employ at the time of his death, and

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to make the recognition depend upon the length of their services. That being the case, it seems to me that it is immaterial whether it was continuous or not, as if the testator had had in mind an intention to restrict its provisions to persons who had been in his employ continuously, no doubt he would have indicated it by the use of the word "continuous."

The executors refer to a later paragraph in the will, in which he provides that service in either of the two companies shall be deemed a continuous service, as an evidence of the intention that in referring to the period of service he meant that it should be a continuous service. I cannot accept this suggestion; on the contrary, it seems to me to indicate a very broad intention on the part of the testator to permit employees to share in his estate, and his having used the word "continuous" in connection with this peculiar circumstance makes it very significant that he did not use it in reference to the period in which they should be in his employ to entitle them to the legacy.

The legatee Bright is therefore entitled to the sum of $500, and his objections to the account awarding him a less sum are sustained.

The legatee Moeller also objects to the account on the following grounds:

It appears that the legatee Moeller, at the time of testator's death, had been in the employ of said firm for a period long exceeding five years, and would, therefore, be one of the persons entitled to receive a thousand-dollar legacy. In another section of the will, however, the testator provided expressly as follows: "I give and bequeath to Henry Moeller, who is in my employ as porter in my store, the sum of three thousand dollars, in case he should survive me." The said Moeller therefore contends that he is entitled to the specific legacy and that he is also entitled to the legacy given to the class of which he is one. The executors, on the other hand, contend that these provisions are not cumulative but are substitutional, and that he is not entitled to both legacies, but only to the specific legacy.

The principal and earliest case upon this subject is that of De Witt v. Yates, 10 Johns. 158. That case held that where a specific legacy of the same amount is repeated in the will the legatee can only take one of the sums bequeathed, and that they cannot be regarded as cumulative, unless there is some evident

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intention that they should be so considered. This case does not seem to me to be applicable to the case under consideration; the facts there show that the will in question contained two specific bequests for the *same sum* to the *same legatee*, and under such circumstances it was held to be obviously a substitutional provision, and not intended that the legatee should take the total of the two sums.

This proposition was also very carefully considered in Southgate v. Continental Trust Company, 74 App. Div. 150, which adopted the opinion of Justice Scott at Special Term. In discussing the law upon this subject he states as follows: "It has been deemed to be a circumstance favoring the implication of intended accumulation that the legacies differ in amount." Accordingly, it was held in that case, under the various circumstances surrounding the will, that the legacies were cumulative.

Where a person is mentioned in a will in one instance as the recipient of a specific sum, and in another instance named as one of a class, the theory upon which it has been held that legacies are substitutional does not apply, and it is the presumption that the legatee is entitled to take both.

A large number of wills contain provisions of this character, making certain specific provisions, and then making devises or bequests to certain classes of persons, and many times the specific legatee is also one of a class so named.

These legatees are generally next of kin or relatives and have always, so far as I can find by any adjudication, received their bequests without question, and I see no reason why any different rule should apply to strangers or employees, as in the case in question.

The contestant Moeller is, therefore, not only entitled to his specific legacy, but also to the legacy to which he is entitled as one of the employees of the firm who has served a period exceeding five years.

The objections of the contestant Moeller are, therefore, sustained.

Decreed accordingly.

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Matter of the Application of EDGAR W. ABBOT and CHARLES G. CUMMINGS, as Trustees, etc., of ELIOT McCORMICK, Deceased, for Leave to Resign as such Trustees, and for the Appointment of a new Trustee.

(Surrogate's Court, Kings County, February, 1903.)

Trust — Resignation of trustee.

Testamentary trustees, who are also testamentary guardians of an infant, will not be permitted to resign the former trust and continue in the latter, for, if they are incapable of acting as trustees, they cannot be capable of acting as guardians.

Where trustees resign of their own motion, they, and not the fund, should bear the expense of the application.

PROCEEDINGS upon an accounting by testamentary trustees. Application by two trustees who seek to resign.

George G. Dutcher, for trustees Edgar W. Abbot and Charles W. Cummings.

Wilder & Anderson, for Laura Brenton MacDonald (formerly Laura Brenton McCormick), individually, and as testamentary guardian of Theodore Brenton Eliot McCormick, an infant.

William E. Buckley, special guardian.

CHURCH, S. This is an application by two testamentary trustees, who seek to resign. It appears that these trustees, together with one Laura Brenton MacDonald, are testamentary guardians of an infant, who is also the *cestui que trust* of the trust from which they seek to resign.

These testamentary trustees do not seek to resign as testamentary guardians. If they are incapable of attending to their duties as testamentary trustees, then they certainly are incapable of attending to their duties as testamentary guardians, and no decree will be made by me herein accepting their accounts and discharging them as testamentary trustees unless they also resign

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as testamentary guardians. Assuming that they will present such application for resignation as testamentary guardians, I will pass upon their present account as testamentary trustees.

It appears that the trustees have, on the eve of this accounting, turned over to themselves as testamentary guardians of the infant in question the sum of $500, and objection is made to that payment.

The reason of making this payment is not explained, and although counsel for the trustees was requested upon the argument to give some reason why this should be done, he failed to do so. A payment made under these peculiar circumstances, when the party making the same is unable to show any reason therefor, is manifestly made for some ulterior purpose, whether it be good or bad it is impossible to say. Although an improper act, as it is deposited, however, by the guardians for the benefit of the infant no actual money loss will be occasioned thereby, and therefore there is no necessity for surcharging them with this amount.

The second objection is to the payment of $500 by the trustees to their counsel, for the legal services on this application.

As this application was not required in the ordinary administration of the estate, and not for the benefit of the estate or the *cestui que trust*, but solely for the benefit of the trustees, the trustees have exceeded their duty in paying their counsel for such application from the funds of the estate. If trustees desire to resign they themselves should bear the expenditures occasioned by the matter, and not force the estate to pay for their convenience. This item, therefore, is disallowed, and they are surcharged with this amount.

The trustees under the will, as interpreted by the decisions of the Appellate Division, should not turn over to the guardians of the infant the surplus income in their hands. On the contrary the surplus income should be applied to the use of such infant, as may be directed by the surrogate.

The trustees will not be allowed their commissions on the amount which they received from themselves on the previous accounting, but commissions will be allowed simply on the additional income actually received.

Where trustees seek to resign their trusts it is manifest that the estate should sustain as little loss thereby as possible, and

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where it is apparent that the new trustees will be entitled to full commissions on the amount turned over to them, then the least that can be expected of the retiring trustees is that they shall not expect the estate to pay these commissions twice.

Upon it appearing that the testamentary trustees have also resigned as testamentary guardians a decree will be entered settling their accounts, as above indicated, and discharging them as such testamentary trustees.

Decreed accordingly.

Matter of the Estate of GEORGE F. GILMAN, Deceased.

(Surrogate's Court, New York County, February, 1903.)

Administration — Surrogate's lack of jurisdiction to confirm a contract of administrators for turning their intestate's business over to a foreign corporation and taking stock in it for his interest — Code C. P., § 2719.

That part of Code C. P., § 2719, which declares that a surrogate may authorize an executor or administrator to compromise a claim gives the surrogate no jurisdiction to permit and approve a contract, made between administrators and one who claims to have been an equal partner with their intestate in a business, by the terms of which the administrators are to assign all their intestate's interest in the business to a corporation to be created under the laws of another State, accept in payment a part of that stock, and permit the alleged surviving partner to take the rest of it.

Administrators sell on their own responsibility and if they sell for anything except cash ordinarily they take the risk.

APPLICATION by the administrators of decedent to permit and approve of a contract entered into by them.

Ormiston & McCormick, for petitioner Gilman.

Brush & Crawford, for Edward J. Norton, administrator.

Hyde, Leonard & Lewis, for Geo. W. Smith, creditor.

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THOMAS, S. Counsel for the petitioners are correct in their contention that it is not material for the purposes of the present application whether the decedent was domiciled in this State or in the State of Connecticut. The administrators appointed here have the same powers and duties as to the assets in this State and they are equally subject to the jurisdiction of this court, out of which their letters issued, if they are domiciliary administrators or if their administration is, for some purposes, ancillary to that being had in another State (Smith v. Second Nat. Bank, 169 N. Y., 467; Matter of Hughes, 95 N. Y., 55; Despard v. Churchill, 53 N. Y., 192; Parsons v. Lyman, 20 N. Y., 103).

The decedent had, in his lifetime, been engaged in business as a retail dealer in tea and other merchandise under the names of "The Great Atlantic and Pacific Tea Company" and "The Great American Tea Company." This business was so extensive that it was carried on in 198 separate stores in different parts of the United States, and employed upwards of 1,800 persons. Though all leases were taken in the name of the decedent, and contracts were made on the credit of his name, it is alleged by Mr. George H. Hartford, who was the manager of the business, that he was interested as a partner in the assets and property to the extent of one-half, and a suit is now pending in the Circuit Court of the United States for the Southern District of New York, upon the complaint of Mr. Hartford and against the administrators, to enforce his claim. The knowledge of Mr. Hartford of the affairs of this great business is a valuable asset, and, induced by this and other considerations, the administrators have entered into a contract with him, which contract I am now asked to permit and approve.

All of the parties interested as next of kin of the decedent consent to the making of the contract. The only objection to it comes from certain persons holding claims against the estate of the decedent, which claims are disputed by the administrators. Though notice of this application has been given to these creditors, no Code provision permits a proceeding against them for the purposes of the relief sought, and the order, if made, would have no greater force against them than if made *ex parte*. The first question to be construed is as to whether I have any jurisdiction to make the order applied for.

The contract requires the administrators to assign and transfer

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all of the interests of the decedent in the assets and property of said business to a corporation to be created under the laws of the State of New Jersey; to accept in payment a portion of the stock of that corporation, and to permit Mr. Hartford to take the balance of that stock. The details of the proposed arrangement are not material for our present purposes.

The provision of law under which I am urged to act is contained in section 2719 of the Code of Civil Procedure as follows: "The surrogate may authorize the executor or administrator to compromise or compound a debt or claim, on application, and for good and sufficient cause shown, and to sell at public auction on such notice as the surrogate prescribes, any uncollectible, stale or doubtful debt or claim belonging to the estate; but any party interested in the final settlement of the estate may show on such settlement that such debt or claim was fraudulently or negligently compromised or compounded."

I agree that this permits the surrogate to authorize the compromise of a claim made against the estate, as well as one made in its favor. The decisions to the contrary were under an earlier statute (Estate of Farley, 15 N. Y. St. Repr., 727; L. 1847, ch. 80, am'd by L. 1888, ch. 57, and L. 1893, ch. 100, and L. 1893, ch. 586). I might, therefore, possibly approve a transfer of part of the estate to a stranger in satisfaction of his claim and call it a compromise. I might, on the same ground, ratify a contract admitting the claim made by Mr. Hartford as a surviving partner. But I cannot see clearly how the approval of a transfer of all of the assets of the estate to a New Jersey corporation, in consideration of stock of that corporation, can be justified by any such reasoning.

Sales of the property of the estate of a decedent must be made by the personal representatives, on their own responsibility. The only statute known to me which permits the surrogate to determine the propriety of such sales in advance of an accounting is the one already set forth, and that is confined to the sale of uncollectible debts by auction and for cash. If an administrator sells for anything but cash, except in rare and exceptional cases, he becomes the guarantor of the results of the transaction, and if it proves unfortunate he may be charged as for a *devastavit*. In the county of New York he may not even sell upon credit with approved security (Code C. P., § 2717). His investments must

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also be made upon his own judgment and at his own hazard, and purchases of the stock of a corporation, either foreign or domestic, are not favorably regarded (King v. Talbot, 40 N. Y., 76).

Under the peculiar circumstances of this case it may well be that the proposed arrangement is a good one. It has received the approval of numerous interested persons, acting under the advice of counsel apparently well informed. I place my refusal to grant the order solely upon the ground of want of jurisdiction.

Application denied.

Matter of the Contested Will of HENRY DIEFENTHALER, Deceased.

(Surrogate's Court, New York County, February, 1903.)

Will — Execution.

The Statute of Wills (2 R. S. m. p. 61–63, § 40) does not require that a testator's declaration to the witnesses, that the instrument subscribed by him is his last will and testament, be made to both witnesses at the same time nor does it require them to sign as witnesses in the presence of each other.

PROCEEDINGS upon the probate of a will.

Edward F. Hassey for proponent.

Denis Quinn, special guardian, respondent.

THOMAS, S. The paper propounded for probate bears the signatures of the decedent and two subscribing witnesses. One witness testifies that he drafted the instrument in accordance with instructions of the decedent, who subscribed it in his presence and declared it to be his will and requested him to sign as a witness, which he thereupon did. No other person was present at that time. The other witness testifies that, a few days after the paper had been signed by the decedent, he met the decedent in the place of business of the first witness; the paper was then taken from a safe, bearing the two signatures of the decedent and the first witness; the decedent then acknowledged

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his signature and declared the paper to be his will and requested the second witness to sign, which he did. As to these facts there is absolutely no contradiction, and, assuming them to be true, the will was sufficiently executed under the requirements of our statute. It was subscribed by the testator at its end and such subscription was "acknowledged by him to have been so made to each of the attesting witnesses"; the testator at the time of acknowledging the same declared the instrument so subscribed to be his last will and testament, and there were at least two attesting witnesses, each of whom signed his name as a witness at the end of the will, at the request of the testator (2 R. S., 63, sec. 40). Our statute does not require that the acknowledgment of the testator or his declaration shall be made to both witnesses at the same time, or that they shall sign in the presence of each other (Hoysradt v. Kingman, 22 N. Y., 372; Willis v. Mott, 36 id. 486; Matter of Carey, 14 Misc. Rep. 486, 490; Barry v. Brown, 2 Dem., 309; Lyman v. Phillips, 3 Dem., 459, aff'd sub nom. Matter of Phillips, 34 Hun, 627, aff'd 98 N. Y., 267).

The second witness testifies that the first witness was present when the paper was shown to him and when he signed; that he took it from the safe and returned it to the safe. The first witness does not remember this, but refuses to say that it may not be true. He does remember that he knew the second witness had signed, and that he found his signature on the instrument when he took it from his safe after the death of the decedent, but it is his recollection that he was told of such signing and was not present when it was done. I think it probable that the second witness remembers the facts with accuracy, and will so find, but it is entirely immaterial as to whether the one version or the other is the correct one.

It is not questioned that the decedent was of sound mind and free from restraint. The propounded paper declares his wishes, it was duly attested and must be admitted to probate.

Probate decreed.

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Matter of the Judicial Settlement of the Account of Proceedings of OLIVE HITCHINS, Deceased, Trustee Under the Last Will and Testament of JOHN HITCHINS, Deceased, Made by CALVIN A. GARDNER and CHARLES E. BABCOCK, Executors of said OLIVE HITCHINS, said Deceased Trustee.

(Surrogate's Court, Rensselaer County, February, 1903.)

Executor — Refused commissions as trustee — Beneficiary as sole trustee.

Where the will of a testator, giving his wife the income from all his estate until she remarries or dies as well as the right to use the principal if she needs it, declares that she is to hold the property in trust but imposes no duty upon her as trustee which is not hers as executrix, her executors are not, after she has received full commissions upon the estate as sole executrix upon an intermediate accounting, entitled to claim in her right commissions upon the estate as trustee.

No person can be trustee for herself and where a will makes the sole beneficiary sole trustee she cannot act and is not trustee.

PROCEEDINGS upon the judicial settlement of the account of the executors of a trustee.

Calvin S. McChesney, for petitioners.

M. A. Tierney (William J. Roche, of counsel), for administrator with will annexed of John S. Hitchins, deceased.

E. W. Douglas, for Francis A. Douglas and Mary A. McKee.

J. W. & J. V. Coffee, for George M. Hitchins.

Hayner & Ward, for John Hitchins Gardner.

James Farrell, special guardian, for Irene Hitchins.

A. C. Comstock, special guardian, for Alonzo G. Hitchins and Sadie A. Hitchins; also for Olive Hitchins.

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HEATON, S. This is an accounting by the executors of the will of Olive Hitchins, deceased, purporting to cover her acts as trustee under the will of John Hitchins, deceased. The accounting parties ask an allowance to them of commissions upon the amount of the corpus of the so-called trust estate received by Mrs. Hitchins from herself as the sole executrix of the will of John Hitchins.

The will of John Hitchins was probated in this court December 24, 1884, and, so far as it affects this decision, reads as follows:

"*First.* I John Hitchins above named do hereby nominate constitute and appoint my beloved wife Olive Hitchins my executrix of this my last will and testament.

"*Second.* I give, devise and bequeath to my said executrix all the property which I shall own or be interested in at the time of my death whether the same be real or personal wherever the same may be situated upon the trusts and subject to the conditions hereinafter mentioned, except that I give to my said wife Olive absolutely as her own property and not in trust all my household furniture pictures books silver plate, and horses wagons carriages sleighs harnesses and robes used for pleasure purposes.

"*Third.* The property hereby devised and bequeathed in trust is so devised and bequeathed in trust to support liberally my said wife Olive during her life or so long during her life as she shall remain my widow and unmarried, and upon her death or remarriage to go to the objects of my bounty hereinafter named.

"*Fourth.* To carry out the objects of the trust hereby created the said Olive is authorized to sell and convey all or any portion of the property devised and bequeathed to her in trust, to make new investments thereof to make repairs and improvements on real estate and do all acts in her name as such trustee and executrix as she may deem beneficial to my estate, and while she so remains my widow and unmarried all the income of my estate shall belong to her and she shall be at liberty to use at any and all times so much of the principal of my estate for her support as she shall deem necessary to her comfort in case she shall find the income inadequate.

"*Fifth.* The above mentioned trust is subject to this modification and additional provision my said wife as my trustee as aforesaid in case my brother Stephen shall become destitute of the means of comfortable support shall pay yearly and every

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year from the income of my said estate to my said brother Stephen or for his support the sum of two hundred dollars so long as his life and destitution shall continue and my said wife is also authorized in case I shall have no lot in the Troy Oakwood Cemetery or no suitable monument therein or the lot shall not be suitably ornamented to expend from the principal of my estate such sum as shall be necessary to purchase a suitable lot erect a suitable monument, suitably ornament the lot and invest not exceeding five hundred dollars for the purpose of keeping the same in repair forever."

The sole executrix at once qualified and entered upon the discharge of her duties. On the 27th day of December, 1886, she applied for a judicial settlement of her accounts as such executrix, which resulted in a decree entered February 21, 1887, settling such account and allowing her full commissions as executrix. Such decree does not in words purport to be a final judicial settlement nor to discharge such executrix, but adjudges and decrees that the said Olive Hitchins now holds in her hands as trustee for the benefit of the estate of the said John Hitchins, the following property: then follows the list of securities for receiving which the accounting parties ask that her estate be now allowed commissions upon a valuation of upwards of $75,000.

If the decree of 1887 precludes this court from holding that Mrs. Hitchins has not been at any time a trustee as distinguished from an executrix, and if such decree made her a trustee after her duties as executrix were terminated then the question of allowance of commissions is not an open one, but must be determined in favor of her estate. The decree of 1887 does not purport to be a final judicial settlement, it does not recite that the executrix has accounted for all the estate and that she is entitled to a discharge as executrix, but simply settles her account, allows her full commissions and adjudges that said Olive Hitchins then holds the residue of the estate as trustee. It does not appear from the records of this court that as trustee she ever executed a voucher to herself as executrix in compliance with the claimed direction of the decree, but so far as appears she continued to hold the securities as executrix at the time of her death.

The decree cannot be held to have made a trust if there was none made by the will, nor to have conferred upon the executrix

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any new right or privilege. It is not an adjudication binding this court in deciding this application. McKie v. Clark, 3 Dem. 380; Matter of Union Trust Co., 35 Misc. Rep. 260; Cluff v. Day, 124 N. Y. 195; Johnson v. Lawrence, 95 id. 154–164.

The provisions of the will and not the provisions of the prior decree must determine the question.

The rule which governs in determining whether double commissions should be allowed has been plainly stated several times. The cases agree that to entitle the same persons to commissions as executors and as trustees the will must provide either by express terms or by fair intendment for the separation of the two functions and duties, one duty to precede the other and to be performed before the latter is begun, and must not provide for the coexistence, continuously and from the beginning of the two functions and duties. Johnson v. Lawrence, 95 N. Y. 154.

What does this will provide? It appoints the widow executrix. It gives such executrix all his estate real and personal for her liberal support until she remarries or dies, and from and after either event a division of the same is directed among the objects of his bounty. The widow is given power to sell, make new investments and to repair and improve real estate, and if she shall deem the income from the estate insufficient to support her in comfort she may use the principal. She is charged with paying from this income $200 a year for the support of a brother under certain conditions, and with doing some work at the cemetery to be paid for out of the principal.

In making a simple provision that his wife shall have the income from all his estate until she remarries or dies, the testator makes use of the words "in trust," "trust," "executrix" and "trustee," but their application is not to a trust estate separate and apart from her estate as executrix. No duty is imposed upon her as trustee that is not hers as executrix. The scheme of the will does not contemplate a separation of the duties of executrix and of trustee in point of time or in method of procedure. Such a separation is necessary to justify the allowance of double commissions. Johnson v. Lawrence, *supra;* McAlpine v. Potter, 126 N. Y. 285; Matter of Hood, 98 id. 363.

There is still another reason which seems to be fatal to the contention of the executors. If the widow was trustee for any one it was for herself alone, at least until her remarriage, which

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did not occur. Up to the time of her remarriage or death she was entitled to the whole income. It is well settled that the trustee and the beneficiary must be distinct personalities or otherwise there could be no trust, and the merger of interests in the same person would effect a legal estate in him, of the same duration as the beneficial interest designed. That the legal and beneficial estates can exist and be maintained separately in the same person is an inconceivable proposition. Greene v. Greene, 125 N. Y. 506–510; Bull v. Odell, 19 App. Div. 605; 46 N. Y. Supp. 306; Matter of Griffin, 167 N. Y. 78.

Where a will makes the sole beneficiary sole trustee he cannot act as trustee. Rogers v. Rogers, 111 N. Y. 228–237; Irving v. Irving, 21 Misc. Rep. 743; 47 N. Y. Supp. 1052.

The widow then was not legally trustee of the income. Neither could she be trustee of the corpus for the legatees who were to take the property after her death, for such trust, if any, sprang into life at the same instant with the executorship and inextricably blended with it.

It necessarily follows commissions cannot again be allowed upon such property as has once paid the commissions.

Decreed accordingly.

Matter of the Appraisal for Taxation of the Estate of CLARISSA CONKLIN, Deceased.

(Surrogate's Court, Suffolk County, February, 1903.)

Transfer tax — Estate less than $10,000.

An estate less than $10,000 in value is subject to the transfer tax, as fixed by the Tax Law of 1896, only when that part of it passing to persons not specifically exempted by statute equals or exceeds $500 in value.

APPEAL from decree exempting estate from transfer tax.

Nathan L. Miller, State Comptroller, in pro. per., appellant.

William B. Codling, for executor respondent.

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PETTY, S. It is conceded on this appeal that the amount of the estate is $2,026.64, of which $1,776.64 passes to sisters, and $250 to a grand niece, a cousin, and a third legatee unrelated. That the last-mentioned sum is taxable at 5 per cent is the claim of the State on the ground that its taxability is controlled by the fact that the estate is over $500 in value.

It is true that the amount of the estate must be first determined, for if less than $500 no tax attaches, no matter to whom it is given.

The statute in force at the death of the testatrix (Laws of 1896, chap. 908) provides that a tax shall be imposed when the transfer is of property of the value of $500 or over. § 220. It is further provided that a transfer to a sister is entirely exempt when it is of property valued at less than $10,000. § 221. And finally, it is provided that the word "property" shall mean the property of the decedent "*transferred to those not herein specifically exempted from the provisions of this article.*" § 242.

The sum of this law is, therefore, that, given an estate of less than $10,000 value, it is taxable only when that part of it passing to persons not specifically exempted equals or exceeds $500 in value. In the case at issue the amount passing to the sisters is specifically exempted, the estate being less than $10,000, and the amount passing to those not specifically exempted is less than $500 and likewise not taxable. Matter of Bliss, 6 App. Div. 192; Estate of Taylor, 6 Misc. Rep. 277; Matter of Flynn's Estate, 30 N. Y. Supp. 388.

It is urged that the Bliss case, *supra*, is reversed by Matter of Corbett, 171 N. Y. 516, but I do not so read it. The facts in the Corbett case are entirely different, the estate being over $10,000 and no one being specifically exempted. By no possible construction can that case be made to hold that bishops and religious corporations are the *only* specific exemptions in the act. The section of the act exempting them, and, in certain cases, sisters is entitled "exceptions and limitations" and the conclusion reached in both the Bliss and the Corbett case is but a strict following of the statute itself.

Appeal dismissed, without costs.

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MEMORANDA

OF

CAUSES NOT REPORTED IN FULL.

SUPREME COURT, APPELLATE TERM, NOVEMBER, 1902.

T. SIDNEY KALLIS, Respondent, *v.* BENJAMIN LISSBERGER and HENRY LISSBERGER, Composing the Firm of R. LISSBERGER & Co., Appellants.

APPEAL by defendants from a judgment and order of the General Term of the City Court of the city of New York, affirming a judgment in favor of the plaintiff, entered upon the verdict of a jury, directed by the court, and also affirming an order denying defendants' motion for a new trial.

Paul Hellinger (A. H. Parkhurst, of counsel), for appellants.

George H. Epstein, for respondent.

FREEDMAN, P. J. This action was brought by plaintiff to recover $2,000, the amount of his promissory note which he gave to the defendants and which they negotiated, so that plaintiff was obliged to pay it to an innocent third person at maturity. By his complaint the plaintiff claimed that he gave said note to defendants in part payment for a quantity of copper-bearing material which they later agreed to sell and deliver to him pursuant to an agreement made December 7, 1901; that they failed to deliver in accordance therewith; that for their failure to so deliver the plaintiff rescinded said agreement on his part, and thereupon demanded the return of his said note, but that defendants refused to return the said note or the $2,000 realized thereon.

The defendants, by their answer, denied the execution of any contract on December 7, 1901, and alleged that the only contract made was under date of December 3, 1901; that the note for

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$2,000 was delivered solely on account of that contract; that the merchandise covered by said contract was duly tendered to said plaintiff, who refused to accept and receive the same, and that thus the contract was broken by the plaintiff and not by them.

At the trial evidence was given by both sides and at the close of the evidence a verdict was directed for the plaintiff.

The material facts, established at the trial, are as follows: On December 3, 1901, the plaintiff and the defendants entered into a contract, in writing, for the sale by the defendants to the plaintiff, but subject to defendants' purchase, of 50,000 pounds siftings and about 30,000 pounds grindings, at twelve and one-quarter cents per pound for copper contents, based on fire assay, delivered F. O. B. cars New York, the material to be weighed, sampled and assayed at certain works at Constable Hook, N. J., at sellers' expense, freight to be paid from New York to Constable Hook by buyer, and the terms were a thirty days' note for seventy-five per cent. of amount of invoice upon defendants' paying draft for the same, balance after assay and weights are determined.

At the time of the making of this contract the plaintiff was informed that the goods were to be purchased, if possible, in the West.

On December 5, 1901, the defendants wrote to the plaintiff that the goods had been purchased and would be shipped by Saturday, and that the plaintiff the next morning should call up the defendants so that they could talk to him about shipping directions. Pursuant to this letter the plaintiff called on the defendants on December 7, 1901. At that meeting there was some conversation about the shipment of the goods and their expected arrival, and at the close of it the plaintiff executed and delivered to the defendants his note for $2,000 on receipt of the following writing, viz.:

"New York, *December* 7, 1901.

"Received from T. S. Kallis his thirty days' note for $2,000 against which we are to deliver him 80,000 to 90,000 lbs. of copper-bearing material, same to be delivered the latter part of next week. It is understood that the balance which will be due is to be paid upon verification of the weights and the determination of the assays.

"B. Lissberger & Co."

The last day of "the latter part of next week" was December fourteenth. On that day the defendants failed to deliver and

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thereupon, on December sixteenth, the plaintiff notified the defendants that he would not, after the last-mentioned date, accept the goods.

The defendants made no tender until December eighteenth, and in the meantime the market for copper had fallen.

Now as to the extent of the conversation which, at the meeting of December 7, 1901, resulted in the execution and delivery by the defendants of the written instrument above set forth and in the delivery by the plaintiff of his promissory note, the testimony of the parties differs. The conversation was had between the plaintiff and the defendant Benjamin Lissberger, and the latter admitted that in the course of it he requested the plaintiff to give his note as he expected the arrival two days thereafter of the draft drawn against defendants' purchase of the goods; that the plaintiff was willing to give the note then and there, but wanted a written acknowledgment; that thereupon he (Benjamin Lissberger) called in a stenographer and dictated the written instrument above set forth and then signed and delivered it to the plaintiff. This inferentially corroborates plaintiff's version of said conversation to the effect that, before he would give his note, he wanted the time of delivery fixed as not later than December fourteenth.

But independently of that the evidence is sufficient to sustain the direction of the verdict.

The contract of December third was a provisional and conditional one. It was made subject to the purchase of the goods by the defendants. If they could not buy them, they could not deliver them, and the transaction would be off. No arrangement as to delivery could be made before the procurement of the goods by the defendants. On December fifth the defendants notified the plaintiff that the goods had been purchased by them, and evidently knowing that something further had to be agreed upon, they wanted to get shipping directions which involved the matter of delivery. Now this additional matter was agreed upon. According to the testimony of the plaintiff it was done on December seventh, and in this he stands corroborated by the admissions and acts of Benjamin Lissberger as hereinbefore stated. But if, according to the claim of Benjamin Lissberger, nothing was said on December seventh about delivery, then in view of the conceded fact that the writing of December seventh was dictated by him to his own stenographer and delivered by him to the plaintiff, because the plaintiff insisted upon a writing, and that such writing con-

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tains the stipulation that the goods were to be delivered the latter part of next week, viz., on or before December fourteenth, what is the irresistible conclusion? Clearly that there must have been a previous understanding between the parties as to when delivery should be made and that that understanding was so well known to both of them that it was no longer necessary to refer to it specifically then and there, and that the defendants felt that pursuant to it it was incumbent upon them to complete the written contract by inserting the stipulation as to delivery on or before December fourteenth. Some modification of the provisional contract had been made between December third and December seventh by parol as to the place of delivery and it is possible, although the evidence does not show it, that in connection with it the time of delivery was fixed. But whatever version may be adopted, the fact remains that the plaintiff would not have given his note unless he got the writing of December seventh, and that that writing, besides containing a receipt, also embodies in legal effect a supplemental contract in aid and completion of the contract of December third. Both contracts are, therefore, to be taken and construed together, and, when this is done, the obligations of the defendants to deliver on or before December fourteenth clearly stands forth as an essential part of the entire contract.

Even if it had been necessary for the plaintiff to show a new consideration moving to the defendants for their execution and delivery of the supplemental contract of December seventh the plaintiff met this requirement by showing that he gave his note on the faith of it several days in advance of the time that the defendants could be called upon to pay the draft.

In every aspect of the case, therefore, the defendants were bound to deliver on or before December fourteenth and, not having done so, the plaintiff had the right to rescind, and did rescind, the contract on December sixteenth.

The foregoing views render all the exceptions taken by the defendants untenable.

The judgment and order must be affirmed, with costs.

MacLean and Blanchard, JJ., concur.

Judgment and order affirmed, with costs.

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HERBERT C. PLASS, Appellant, *v.* JONAS WEIL et al., Respondents.

APPEAL by the plaintiff from an order of the General Term of the City Court of the city of New York, reversing a judgment rendered by a jury at a trial term of said court and ordering a new trial.

H. A. Sperry, for appellant.

James, Schell & Elkus, for respondents.

BLANCHARD, J. The variance between the allegations of the complaint and the proof thereof at the trial did not amount to a failure of proof. Such variance only arises where there is a failure to prove an allegation in a pleading in its entire scope and meaning. Code Civ. Pro., § 541.

The court must give a liberal construction to pleadings with a view to substantial justice. Code Civ. Pro., § 519.

The contract between the parties was an entire one. It arose out of the sole purpose of the defendants that the plaintiff should examine and appraise the real estate in order that he might qualify himself as an expert to testify in court in their behalf if they should require his testimony. For this service they agreed to pay him $250 for the appraisement and $150 in addition, if he were required in court to testify in connection with the appraisement which he had made. The value of the services which might be rendered by the plaintiff as an expert witness to the defendant depended on and grew out of his appraisal of the real estate, and such service as an expert witness was, under the terms of the contract, incidental to his employment as an appraiser.

The plaintiff made the appraisal, but his testimony in relation thereto was not required by the defendants.

At the trial the plaintiff's own testimony clearly indicated that he had earned only that portion of the contract price relating to the appraisal of the real estate, viz., $250.

The defendants' answer and proof admitted their liability to pay this plaintiff $250 for the appraisal.

On this evidence the court allowed the case to go to the jury for its determination as to what the contract was and as to whether the whole amount claimed by the plaintiff, viz., $400, was due to him or only the sum of $250, as claimed by the de-

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fendants. This was improper. There was no disputed fact for determination by the jury. The court should have directed a verdict for the plaintiff in the sum of $250 and interest, amounting to $4.20, in all $254.20.

The jury rendered a verdict for the full amount claimed by the plaintiff with interest and judgment thereon was entered against the defendants with costs.

On appeal by the defendants the General Term of the City Court reversed the judgment and ordered a new trial. From that order the plaintiff now appeals to this court, having given the stipulation required by the Code of Civil Procedure, § 3191, that judgment absolute be rendered against him if the order appealed from is here affirmed.

In view of the character of the testimony the order of the General Term of the City Court of New York should not be affirmed, because it should not have reversed the judgment of the trial court and directed a new trial, but should have modified the judgment by reducing the amount $406.73 specified in the judgment to the sum of $254.20.

This court has the power to now render such judgment. Freel v. County of Queens, 154 N. Y. 661.

Let the judgment of the General Term of the City Court be reversed and the judgment of the trial court be reduced to $254.20 and as so modified affirmed, without costs of either appeal to either party.

FREEDMAN, P. J., and MACLEAN, J., concur.

Judgment of General Term and judgment of trial court reduced to $254.20 and as so modified affirmed, without costs of either appeal to either party.

ISAAC SUNSHINE, Appellant, *v.* THOMAS MORGAN, Defendant-Respondent, AARON FISCHER, Defendant-Appellant, JAMES SHEA, Defendant.

APPEAL by the plaintiff and by the defendant Fischer from a judgment of the Municipal Court of the city of New York, eighth district, borough of Manhattan, in favor of the defendant, in an action to foreclose a mechanic's lien.

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Maas & Goldberg (Victor Goldberg, of counsel), for appellant Sunshine.

Ernest Cheltick, for appellant Fischer.

McCurdy & Yard (John Yard, of counsel), for respondent Morgan.

MacLean, J. Of the parties defendant, Morgan was the owner and lessor, Shea the lessee, and Fischer a subsequent lienor. Sunshine was the first lienor. In a lease of certain premises by Morgan, dated September 4, 1901, for a term of five years from November first of that year, Shea agreed, at his cost and expense, to make all repairs, both external and internal, including the roofs and sidewalk, during the term, and in consideration of this covenant and its performance, Shea was given possession on the fourth of September, and had his rent reduced to $400 for the first year. Sunshine and Fischer, under engagement by Shea, did repairing, furnishing material and labor upon the building which had been injured by fire. Judgments have been rendered in their favor against Shea. The question upon this appeal is whether the plaintiff is entitled to a lien upon the premises, as one who has performed labor and furnished material for the improvement of the property with the consent of the owner.

Before the lease was executed, Mr. Shea said that he would have to paint and plaster the building throughout, change partition, flooring and staging, and paint the exterior. Mr. Morgan said he wanted to see the plans so that he would know his building was not injured. The plans were submitted and approved. Then, with the plans lying in his desk, Mr. Morgan signed a lease, containing the provision noted above; he wanted to see that the repairs were done properly so as not to have trouble with the department, and hoped everything would go along smoothly, that Shea would go right to work at it and finish it up; but he declined to sign an application to the building department, saying Mr. Shea must make his own repairs himself and pay for them. Both lienors had all their transactions with the defendant Shea. Neither saw nor had any communication with the defendant owner, until after the work was done, excepting that Sunshine, when at work at the premises, saw him, was asked what would be on the wall, and said we will put burlap on the wall. The consent of the owner to the performance of the labor, or the furnishing of material, by

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either lienor, cannot be spelled out of this. "Mere acquiescence in the erection or alteration with knowledge is not sufficient evidence of the consent which the statute requires. There must be something more. Consent is not a vacant or neutral attitude in respect of a question of such material interest to the property owner. It is affirmative in its nature." De Klyn v. Gould, 165 N. Y. 282, 287. Counsel for the appellant here urges that his position is within the ruling in National Wall Paper Co. v. Sire, 163 N. Y. 122. In that case, however, the tenant was under no obligation to make the improvement, and before he engaged the contractor to make it he conferred with the lessor, exhibited him a specimen room and told him he ought to pay part of it. Moreover, that lessor was in attendance during the progress of the work, and frequently expressed his admiration and approval. The claims of both lienors were properly dismissed.

Judgment affirmed, with costs to the respondents.

FREEDMAN, P. J., concurs.

BLANCHARD, J. (concurring). The appellant argues with great strenuousness the case of National Wall Paper Co. v. Sire (163 N. Y. 122), claiming that by reason thereof there should be a reversal of the judgment. That case has been materially limited in the recent case of Rice v. Culver, 172 N. Y. 60. In distinguishing the National Wall Paper case, Judge Cullen says: "The landlord supervised and directed the performance of the work. His acts and conduct were such as to authorize the finding by the trial court that he actually participated in procuring the work to be done. This case is barren of the features alluded to. The appellant exercised no control or supervision over the performance of plaintiff's contract."

There is no proof in the present case of any control or supervision exercised by the defendant Morgan.

I concur in the opinion of Mr. Justice MacLean that the judgment of the lower court was right.

Judgment affirmed, with costs to respondents.

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ISRAEL LEVY and ISAAC LEVY, Respondents, *v.* LAZAR ABRAMSOHN et al., Appellants.

APPEAL from a judgment in favor of the plaintiffs, rendered in the Municipal Court of the city of New York, second district, borough of Manhattan.

Leonard A. Snitken, for appellants.

Gustavus A. Rogers, for respondents.

MACLEAN, J. Under allegations in oral pleadings of fraud and deceit the plaintiffs testified to statements of Lazar Abramsohn, in the presence of his two sons and codefendants Meyer and Samuel, respecting their being partners in business and further to statements as made by Lazar, the father, not in the presence of his sons, as to his and their means and standing to obtain credit with the plaintiffs upon the purchase of merchandise. Having thereby, as evidenced by the judgment, established to the satisfaction of the learned justice, the partnership and that goods were obtained for the use of the firm by fraud of one of its members, it was proper to hold that the other partners by receiving and participating in the use of the goods adopted the fraudulent acts of the one who obtained them, and were in the same situation in reference to the rights of the vendors of the goods as if they had directed the senior partner to procure the goods or had concurred in the transaction. Coman v. Allen, 21 How. Pr. 114. The fact that some of the goods were obtained six months after the credit was induced by the representations found herein to be fraudulent does not aid the defendants. Bradley v. Seaboard Nat. Bank, 167 N. Y. 427, 430. Nor will it avail the defendant that, saving his own appearance, there was no contradiction of his statement that he had not reached his majority at the time of the transaction, for the learned justice was not bound to believe the assertion of him, an interested party. Garbarsky v. Simkin, 36 Misc. Rep. 195.

Judgment affirmed, with costs to the respondents.

FREEDMAN, P. J., and BLANCHARD, J., concur.

Judgment affirmed, with costs.

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JOHN J. CANAVAN, Appellant, *v.* THE JOHN HANCOCK MUTUAL LIFE INSURANCE CO., Respondent.

APPEAL by the plaintiff from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, sixth district, borough of Manhattan.

Quintin & Foulk, for appellant.

Langbein & Langbein, for respondent.

BLANCHARD, J. This is an appeal from a judgment entered in the Municipal Court in favor of the defendant.

The action was brought to recover the sum of $228, on a policy of insurance, issued by the defendant on the life of one Connell, payable to his executors or administrators, or to the beneficiary thereunder. It further provided that, "The company may pay a claim under this policy to any relative by blood * * * or to any other person in the judgment of said company equitably entitled to the same by reason of having incurred expenses in any way on behalf of the insured for his burial, or for any other purpose, and the receipt of any such persons shall be conclusive evidence that such sum has been properly paid, and discharge the company from liability under this policy." It also further provides: "That the right is also reserved to change the beneficiary from time to time with the consent of the company by a written notice to said company, but payment upon presentation of the policy and the premium receipt book shall be a discharge of the company."

The home office of the defendant company is in Boston, Mass., and the policy was taken out in that State. At that time the insured was a resident of Massachusetts and came into this State about three years before his death. "Around the nineteenth of June, 1901," according to the evidence in the case, the insured and plaintiff went together to the branch office of the defendant in this city, the insured taking the policy and premium receipt book with him, and met the manager. The insured then told the manager that he desired to have the policy made payable to the plaintiff, who would thereafter pay the premiums, and after some further conversation the manager "wrote on a blank," which the insured and the manager both signed, and the manager said "it would be all right." The policy and book were then delivered to

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the plaintiff, who immediately paid ten weeks' premiums in advance, and he continued in possession of the policy and to pay the premiums upon it until after the death of the insured, which took place on the 16th of February, 1902. After the death of the insured, the plaintiff employed an undertaker, buried the insured and thereby assumed a liability of a little more than one hundred dollars. He also called at the office of defendant to present his claim, and upon request he left the policy, book and proof of death with the company, and was told that he would be notified when he would get the money. Later, he called and was informed that the money had been paid to a sister of the insured. He asked the manager for the policy and book, and the manager told him he did not have them, and that the company would not give them up.

It appears that the sister of the insured took out letters of administration on his estate in Boston, Mass., and as administratrix thereof demanded the payment of the policy and the defendant company paid it to her in full, and took her receipt therefor. We fail to see why that is not a legal bar to plaintiff's right to recover in this action. Under the terms of the policy the defendant was authorized to pay the amount of the policy to any blood relative. That is precisely what the defendant did. It took a proper receipt, which the policy declared should be conclusive evidence that the money was paid, and that such payment should discharge the company from further liability.

The plaintiff failed to protect his rights, and the law does not permit us to aid him now. Before paying the premium and incurring expense he failed to get the consent of the defendant to the substitution of himself as beneficiary, although the policy stated he must do so in order to be binding. The only return the law gives him for his kindness to the deceased is a claim against his estate.

The judgment must be affirmed, with costs.

FREEDMAN, P. J. (concurring). I am in favor of an affirmance of the judgment herein for the following reasons:

The defendant's manager in this city, Hill, had no authority to designate a beneficiary in the policy, or to change a beneficiary therein theretofore designated. His statement, alleged to have been made to the plaintiff and the insured in the conversation in June, 1901, that "it would be all right," was insufficient to bind the company without subsequent ratification on the part of the com-

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pany. This ratification is not shown. There is no evidence going to show that the premiums due on the policy and received by the defendant company after the policy had been delivered to the plaintiff were so received with knowledge that the same were paid by the plaintiff. In the absence of such knowledge the defendant company had a right to assume that such premiums were paid by the assured. Neither is there any evidence that prior to the payment of the amount due under the policy to the administratrix of the deceased in Boston the defendant company had notice of any claim of the plaintiff thereto.

MacLean, J. (dissenting). It would seem that the defendant, maintaining a branch office of its business in this city, equipping its agents here with blank forms for just such an application as was made by the plaintiff, who, at the time, paid ten weeks' premiums in advance, continued payments of premiums during the life of the assured and incurred additional expense in his interment, should have paid or be constrained to pay the proceeds of the policy to the plaintiff as the person equitably entitled thereto.

Judgment affirmed, with costs.

The Jefferson Real Estate Co., Respondent, *v.* M. L. Hiller & Sons et al., Appellants. (Two Cases.)

Appeals from final orders rendered in favor of the plaintiff in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

Weill & Weill, for appellants.

T. H. Friend, for respondent.

Blanchard, J. These are appeals from final orders made in the Municipal Court of the city of New York, awarding possession of the premises to the landlord, after the default of the tenant in the payment of rent.

The actions were brought to recover possession of the premises demised for failure of the tenant to pay two separate instalments of rent due under the terms of the lease. Verified answers were interposed by the tenant, which did not deny any of the allegations of the petitions, but which set up the breach by the landlord of

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covenants of the lease under which the tenant was in possession. These covenants provided, "That the landlord shall put the said building, including all machinery and boilers therein, or appurtenant thereto, and all the steam heating pipes in said building in first-class and tenantable condition and running order and repair," and "that all such work, alterations and repairs shall be made in accordance with the New York Municipal and State laws, and shall be fully made and completed before the commencement of the term of lease demised." The answers then proceeded to set forth the items of damage and pray for a final order dismissing the petition of the landlord. These facts are not set forth as counterclaims nor is affirmative relief asked.

Judgment was granted upon the pleadings in favor of the landlord and the tenant has appealed. The question presented is whether, conceding the statements in the answer to be true, was there anything pleaded which, if established, would defeat the petition. By section 2244 of the Code of Civil Procedure it is provided that in summary proceedings, a verified answer may be interposed "setting forth a statement of any new matter constituting a legal or equitable defense, or counterclaim." And there was added to this by chapter 705 of the Laws of 1893 the following provisions: "Such defense or counterclaim may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action." The question, then, first to be determined is, what might be available as defense to an action for rent.

In connection with this, the language of Chief Judge Andrews, in the case of Thomson-Houston Electric Co. v. Durant L. & Impt. Co., 144 N. Y. 34, 43, where the covenants of a lease were under consideration, may be quoted: "The covenant on the part of the lessee to pay the rent and charges specified in the lease, and on the part of the lessor to deliver the demised premises to the lessee at the commencement of the lease in 'a sound and substantial condition, and in a state of good repair,' and also to make, as soon as practicable, all changes and alterations 'required at any time during the term by any present or future law, ordinance or authority whatsoever,' were distinct and independent covenants. The plaintiff, having entered upon the demised premises under the lease, and continued in possession, was bound to pay the rent reserved, and he could not defend on the ground that the covenant on the part of the lessor to put the premises in repair, or to make changes or alterations required by municipal or other legal authority, had

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not been performed. On the other hand, the lessor, when sued on his covenants, could not allege in bar to the action, that the lessee had remained in possession of the premises. But either one in an action brought against him by the other, could counterclaim any demand arising under the lease against the plaintiff in the action. The tenant, in a suit for the rent, could recoup any damages for a breach of the covenants to repair, and the landlord, if sued by the tenant for a breach of the covenants on his part, could counterclaim the rent reserved by the lease." Here, then, is a clear statement of the law as to the respective rights of landlord and tenant in connection with the matter of covenants as applicable to the present case. This principle has recently been reaffirmed in Jacob v. Thompson, 73 App. Div. 224, 227, and applied to a case of summary proceedings in Douglas v. Chesebrough B. Co., 56 id. 403, 404.

It may be stated, then, that a breach of the covenants in the lease by the landlord not being an excuse for the failure of the tenant to pay rent affords no defense in an action to recover possession of the demised premises, but if accompanied by damages flowing from the breach, these damages are a proper subject of counterclaim.

A counterclaim may be interposed in a summary proceeding to recover possession of demised premises, Sage v. Crosby, 33 Misc. Rep. 117, but no affirmative money judgment can be awarded to either party. Wulff v. Cilento, 28 Misc. Rep. 551; Gay v. Riehmann M. Co., 53 App. Div. 507.

The tenant contends that because no affirmative money judgment can be awarded, therefore, it is improper to set up the damages by way of counterclaim, but that it is proper as a defense, but this inference cannot properly be indulged in. The damages should be offset by way of counterclaim to the extent of the claim of the landlord, and if the damages are in excess of such claim the excess may still be recovered in another action. Gordon v. Van Cott, 38 App. Div. 564.

It follows, therefore, that while the subject-matter of the answers was a proper consideration as a counterclaim to this action, still not being set up as such, the action of the Municipal Court in granting the final orders was proper, and the orders should be affirmed, with costs.

FREEDMAN, P. J., and MACLEAN, J., concur.

Final orders affirmed, with costs.

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CASIMIR HOFFMAN, Appellant, *v.* ELWOOD O. ROESSLE, Respondent.

APPEAL by the plaintiff from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, sixth district, borough of Manhattan.

Holls, Wagner & Burghard, for appellant.

Charles A. Hess, for respondent.

BLANCHARD, J. This is an appeal from a judgment for defendant given after a trial before a justice without a jury in the Municipal Court in the city of New York.

The plaintiff, the father of a pianist making a concert tour in this country, made the defendant's hotel in the city of New York his headquarters while residing temporarily in said city. On the 18th of November, 1901, the plaintiff paid his bill, gave up his room and departed, leaving his baggage, consisting of some trunks and one valise, in the charge of an employee of the defendant, as the plaintiff states, by direction of the defendant's representative, at the office of the hotel, but this is denied by defendant. In the plaintiff's absence, a party presented a forged order at the office of the hotel for the plaintiff's valise, which order was honored, and the valise delivered. The party who presented this order was known to the clerk at the office, as he had dined with the plaintiff on a number of occasions, and had frequently been seen in plaintiff's society about the hotel. The defendant had not seen plaintiff's signature, did not obtain it from his register, and was not familiar with it. Such, briefly, are the undisputed facts of the case.

The first question to be determined is, whether at the time of the loss a relationship of innkeeper and guest existed between plaintiff and defendant. The trial justice correctly decided that such relationship did not exist. Even if it be admitted what seemed to be a fact, that the plaintiff intended to return to the hotel, his sojourn, nevertheless, had for the time being terminated, and there was no enforcible agreement for the resumption of the pre-existing relationship upon plaintiff's return to New York. The plaintiff had ceased to be a guest of the defendant, and the

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defendant could not be held liable as innkeeper. Wintermute v. Clarke, 5 Sandf. 242; Grinnell v. Cook, 3 Hill, 485.

In other jurisdictions, under circumstances very similar to those of the present case, it has been decided that the hotel-keeper was free from liability. O'Brien v. Vail, 22 Fla. 627; Hays v. Turner, 2 Iowa, 214; Miller v. Peeples, 60 Miss. 819.

What, then, was the relationship which existed between the plaintiff and defendant, so far as the plaintiff's baggage was concerned, after plaintiff had ceased to be a guest? It was that of bailee, and as defendant had not nor was not to receive compensation for the storage of the baggage, it being done purely as an accommodation to the plaintiff, the defendant was a gratuitous bailee, and as such he owed to plaintiff simply slight care and can be held only for gross negligence. The trial justice has found that the plaintiff has not shown gross negligence on defendant's part, and that finding is not unwarranted by the evidence.

The judgment should be affirmed, with costs.

Freedman, P. J., concurs.

MacLean, J. (dissenting). Delivery upon a forged order of the luggage of one lately a guest hardly evidences the care ordinarily expected of this sort of bailee, who as is familiarly known wantonly issues a token amounting both to a receipt and to an order to bearer, a token as common as probably to be recognized in the guarantee bond of the imposter.

Judgment affirmed, with costs.

The Automatic Vending Co., Respondent, *v.* August Heins, Appellant.

Appeal from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

G. T. Donnell, for appellant.

Sheehan & Collin, for respondent.

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BLANCHARD, J. Plaintiff recovered a judgment of six cents damages for a violation of the following paper writing: "Automatic Vending Company, 240 West 23rd Street, New York.

"Contract.

"Machine Company, February 16, 1902.

"In consideration of receiving thirty per cent. of the gross receipts of the machine I/we Heins hereby agree to give Automatic Vending Company the exclusive right to place one automatic penny-in-the-slot weighing machine in a prominent location, to be approved by the said company, 802 Col. Ave. for a period of one year. Said right to continue thereafter until a notice in writing of at least thirty days has been given to the Automatic Vending Company for its removal. AUGUST HEINS,
802 Col. Ave.

"This machine is the property of the Automatic Vending Company and any sale or other disposal of it is larceny, and will be prosecuted accordingly."

From this judgment defendant has appealed. It would seem that this case was in the nature of a test of the validity of the writing set forth.

There is some dispute as to the precise nature of this writing, whether it be a license, revocable at the will of the defendant, or a license revocable only after a fixed period of time, or a contract. Whatever the paper may be termed, it does contain a clause binding the defendant to keep the plaintiff's machine for one year. However, it is unnecessary to the determination of this appeal to pass upon the precise nature of the paper writing. Its effect was simply to bind the defendant to maintain plaintiff's machine on his premises, and there was no corresponding obligation on the part of the plaintiff. There was no obligation on plaintiff's part to even place the machine on defendant's premises, and even if placed there, there was no obligation to continue it. The paper was unilateral; there was no mutuality, and, therefore, it was not enforcible by either party. Chicago & G. E. R. R. Co. v. Dane, 43 N. Y. 240; Rafolovitz v. American Tobacco Co., 29 Abb. N. C. 406; affd., 73 Hun, 87, 88; Hurd v. Gill, 45 N. Y. 341, 343; Wilkenson v. Heavenrick, 58 Mich. 574; American Cottion Oil Co. v. Kirk, 68 Fed. Repr. 791, 794; Baltimore & Ohio R. R. Co. v. Potomac Coal Co., 51 Md. 327.

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It may be said that the clause giving thirty per cent. of the profits to the defendant was a consideration making the paper binding, but this only accrued in the event the machine was placed on defendant's premises and retained there, and the retention of the machine was optional with the plaintiff.

The judgment should be reversed, with costs, and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, P. J., and MACLEAN, J., concur.

Judgment reversed, with costs and new trial ordered, with costs to appellant to abide event.

HENRY H. MCCORKLE, Respondent, *v.* WILLIAM H. ELLIS, Appellant.

APPEAL from a judgment of the Municipal Court of the city of New York, tenth district, borough of Manhattan, in favor of the plaintiff.

W. C. Prime, for appellant.

H. H. McCorkle, for respondent.

BLANCHARD, J. This is an appeal from a judgment of the Municipal Court. The action is brought to recover upon a judgment of a justice's court of the State of Texas, recovered September 11, 1893, by one Landa, since deceased, against the defendant and assigned by Landa's administratrix to the plaintiff. The defendant assigns a number of grounds for the reversal of the judgment.

It is claimed, in the first place, that there is no proof of a judgment upon which this suit is based. On a previous trial plaintiff attempted to prove this by an exemplified copy of the record, but the record was not in proper form, and a reversal followed. 35 Misc. Rep. 833.

Upon this trial plaintiff relied upon common-law evidence, taking the deposition of the justice before whom the proceedings were had in Texas and the constable's deputy who served the citation upon the defendant in Texas. Owing to the unsatisfactory condition of the record upon the rulings of the trial court upon

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the reading of the deposition of the justice before whom the proceedings in Texas were taken, it is rather difficult to determine just what is in evidence and what is not.

By the third interrogatory the Texas justice was asked, among other things, to state all the proceedings which were had before him. He answered somewhat at length, and defendant claiming that he had read from a document, asked to have a portion of the answer stricken out. This was denied, and then the remainder of the answer was read and the trial justice, upon motion of the defendant, struck out the latter portion of the witness' answer. The defendant then renewed his motion as to the part of the answer to that interrogatory already in evidence, and which the justice had previously allowed to stand, and upon this motion the trial justice's ruling was as follows: "I will strike out all the answer which shows that he is reading from a document or paper, or anything else; all that portion of the answer which does not show that he is reading from a paper I will let stand."

It is difficult to ascertain where, if at all, the witness started to read his answer, but the respondent should have the benefit of all doubt on this ruling, for the defendant took an exception to the justice's ruling, and we assume, therefore, that the first portion of the answer which, when first passed upon by the trial justice, was permitted to remain in the case was intended by him to remain. With this in the case, the judgment of the Texas court is sufficiently established.

The only other point in the case presenting a question of serious consideration is that of the Statute of Limitations. It is claimed by defendant that the defendant became a resident of this State more than six years prior to the commencement of this action. The only witness to support this position was the defendant himself, an interested witness. It must be assumed in this court from the fact of the judgment being for the plaintiff that the trial justice found that the necessary facts to establish a residence in this State on the part of the defendant were not shown by a preponderance of credible evidence, and with that conclusion this court sees no reason to interfere.

Judgment should be affirmed, with costs.

FREEDMAN, P. J., and MACLEAN, J., concur.

Judgment affirmed, with costs.

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ALIDA B. CRAIG, Appellant, *v.* MARY ROBERTSON, Respondent.

APPEAL by the plaintiff from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

McElheny & Bennett, for appellant.

J. E. Smith, for respondent.

BLANCHARD, J. This is the third appeal in this case, and the law pertaining to it has been substantially settled. There is evidently no desire on the part of the trial justice before whom this case has been tried three times to take into consideration the decision of this court.

The case is a very simple one. The plaintiff was the only witness called; the defendant offered no evidence whatsoever, and the plaintiff's testimony is wholly unimpeached. She testified that she was employed by defendant as a trained nurse at twenty-five dollars a week, from August 20 to September 13, 1900, but that she was actually at work for defendant at defendant's residence for five days; that she was in defendant's employ and subject to her call from August twentieth to September eighth, when she received a telephone call and went to defendant's house. There can be no question from the evidence but that the defendant employed the plaintiff during the entire period of time from August twentieth to September thirteenth. The learned trial justice, however, dismissed the complaint for the reason, so far as we can ascertain from the record, that he interpreted the complaint as for a breach of contract, and held that no breach had been established. The plaintiff, however, alleges in her complaint that she was on or about the 9th of August, 1900, employed by defendant as nurse from August 20, to September 13, 1900, and that she rendered to the defendant her services during that period, so that, so far as the reasons assigned for the dismissal are concerned, it cannot be sustained, nor can it be sustained for any other reason.

There is one feature of the case which, in our opinion, may properly be noticed. The defendant, by her answer, admitted her liability for seventeen dollars and eighty-five cents for five days' services from September eighth to September thirteenth, and alleged a tender but failed to make the tender in court. Upon the first appeal (33 Misc. Rep. 780) this court held that this tender

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was not available, because not kept good by a payment in court, and the plaintiff was clearly entitled to a judgment for at least the amount admitted by defendant's answer to be due.

Upon the second appeal (35 Misc. Rep. 818) this court, in effect, reiterated this decision, and held further that the tender which defendant was required to make in addition to the sum concededly owing to the plaintiff must include the costs of the successful appeal and the disbursements and costs paid below on the first trial. Before going into the third trial the defendant tendered into court the sum of seventeen dollars and eighty-five cents, conceded by her answer to be due (without interest, however), and the sum of fifty-three dollars, the disbursements and costs of the first two trials, but not the costs of either the first two appeals. This was clearly an insufficient tender, as the court has held upon the second appeal of this case, but the question of the sufficiency of the tender is not important, for in our judgment the plaintiff established her claim to the full extent alleged in her complaint.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event, and the new trial should be had in another district to be designated in the order.

FREEDMAN, P. J., concurs.

MACLEAN, J. (dissenting). To my thinking, the judgment of the learned trial justice was right, for the defendant failed to prove performance of the contract she pleaded. The course of the trial moved the court to ask, "Then you are suing for breach of contract, are you?" That brought from the plaintiff's counsel, "You have the complaint before you," and later, after being told it would do no harm to state and save time, "I have forgotten myself; I have not read the complaint since the last trial." So he stood by his pleading upon an express contract until he had rested and his opponent had moved and stated the reasons for dismissal. Then he said, "We are suing for work, labor, and services," to which the court returned, "But your complaint expresses your theory, and when I asked you * * * you stated that the complaint was before me." The plaintiff may not be helped here by the admission in the answer, for it was part of an allegation asserting a different relation from that asserted in the complaint, and one may not avail of part of an allegation without adopting the whole.

Judgment reversed and new trial ordered, with costs to appellant to abide event; new trial should be had in another district.

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SUPREME COURT, APPELLATE TERM, JANUARY, 1903.

A. KLIPSTEIN & Co., Respondent, *v.* HENRY E. MARCHMEDT, Appellant.

APPEAL from an order of the Special Term of the City Court of the city of New York, granting plaintiff's motion for a reargument of a motion made by the defendant, which motion had resulted in the vacation of the order of arrest, and setting aside the order vacating the order of arrest, reinstating the arrest and denying defendant's motion to vacate.

James J. Allen, for appellant.

William H. Blain, for respondent.

FREEDMAN, P. J. The case presented by the moving papers is not one of mistake or misapprehension of fact, but of legal error, and the question is whether the court below, on plaintiff's application, could reconsider defendant's motion to vacate the order of arrest which had resulted in the vacation of the order, and then set aside the order vacating the order of arrest, reinstate the order of arrest and deny defendant's motion to vacate, and all this after the time for appealing from the first order had expired and for no other reason than that since the decision of the original motion a decision was rendered by the Court of Appeals which, if known at the time, would have called for a different determination of the original motion.

A motion for a rehearing or reargument of a motion is generally addressed to the discretion of the court. But the power to grant a rehearing or reargument cannot be arbitrarily exercised, and if the judge grants it upon insufficient grounds it is an error which should and will be corrected by the appellate court whenever the question is properly brought before it for review. Matter of Livingston, 34 N. Y. 576. As a general rule leave to reargue will be granted where it appears that there is some decision or some principle of law which would have a controlling effect and which has been overlooked, or that there has been a misapprehension of fact, but not otherwise. 14 Encyc. of Pl. & Pr. 174, and

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cases there cited. But no case has been cited by the respondent and none has been found by me after an independent and diligent search, in which the power has been exercised after the expiration of the time for appealing from the former decision for the purpose of correcting, for the benefit of a party who might have appealed, an error of law disclosed for the first time by a subsequent decision of a higher court. On the contrary, in Matter of Silliman, 38 Misc. Rep. 226; 77 N. Y. Supp. 267, and Megary v. Shipley, 72 Md. 33, it has been expressly held that after the expiration of the time for an appeal the power will not be exercised. The reasoning of these cases seems to be quite conclusive in view of the express provision of our Code (§ 784), that the time fixed by law to take an appeal cannot be extended. To circumvent that statutory provision in the manner attempted would, as suggested by the Supreme Court of Maryland, put a premium upon laches and permit a party to gain by his default what he could not get by his diligence. This remark is peculiarly applicable to the case at bar. The learned counsel for the plaintiff knew of the decision of the Appellate Term of this court in the case of Reedy Elevator Co. v. American Grocery Co., 24 Misc. Rep. 678, and of the decision of the Appellate Division in the case of Parmele Co. v. Haas, 67 App. Div. 457. Upon defendant's motion to vacate the order of arrest he contended for a view of the law directly opposed to those decisions. When he was beaten, he acquiesced and served no notice of appeal. He says that he then relied upon the correctness of those decisions and consequently did not appeal. He, therefore, intentionally permitted the time to appeal to expire. But when thereafter the Court of Appeals reversed the decision in the Parmele case (see 171 N. Y. 579) he applied for a reargument of the original motion. This should not be permitted. The learned counsel for the appellant is correct in his contention when he says: "The principle that a decision has been acquiesced in and became fixed by the expiration of the time to appeal, may be subsequently opened upon the suggestion of purely legal error, is a dangerous one. It would unsettle every judgment and flood the courts with applications to reconsider matters decided and thought to be at rest. The present case may be a plain one, but if the principle be admitted it will be invoked in matters not so plain. Probably few judgments are rendered which immediately convert the defeated party to their view, and if this principle of reargument because of legal error be once ad-

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mitted, zealous counsel will return again and again to the bar, and the 'day' in court will become Mosaic in its duration.

"Public policy requires that there should be at some time an end to litigation, and when a matter has been once disposed of by a court and there has been no misapprehension or mistake as to the questions presented and decided, and the parties have acquiesced in the decision, and the time to appeal has expired, the matter should not be reopened because at some subsequent period and in another case, there is a change in judicial decision and the law declared otherwise by another court."

The order appealed from should be reversed, with costs, and the motion denied, with costs.

CLARKE and GREENBAUM, JJ., concur.

Order reversed, with costs, and motion denied, with costs.

ADOLPH GREENBERG, Respondent, *v.* HENRY DAVIDSON, Appellant.

APPEAL by defendant from judgment and order of the General Term of the City Court of the city of New York, affirming a judgment in favor of the plaintiff, entered upon the verdict of a jury.

Morris Meyers (Joel M. Marx, of counsel), for appellant.

John Greenberg (Louis A. Jaffer, of counsel), for respondent.

FREEDMAN, P. J. At the trial the plaintiff recovered on two causes of action. No question has been raised as to the second cause of action. The first cause of action, which is the subject of this appeal, was, in effect, to recover the sum of $100 on the alleged oral promise of the defendant to pay that amount to the plaintiff's assignor for an assignment of a certain cause of action which said assignor claimed to have against the defendant's brother for goods sold and delivered. The answer of the defendant set forth that this alleged agreement, not being in writing, was void under the Statute of Frauds, and also denied the agreement. By the verdict of the jury, as renderd, it must be deemed to have been

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established that the assignment by plaintiff's assignor was made as claimed by the plaintiff, and by him delivered to and received by the defendant, and that the defendant orally promised to pay $100 therefor. That being so, the principal question presented by the exceptions taken by the defendant is whether the transaction on the first cause of action was within the Statute of Frauds. The transaction amounted to a sale of a cause of action, and the subject of sale was a thing in action. The statute, so far as applicable to things in action, is that every agreement, promise, or undertaking is void unless it, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therewith, if such agreement, promise, or undertaking is a contract for the sale of any * * * things in action, for the price of fifty dollars or more, and the buyer does not accept and receive * * * the evidences, or some of them, of such things in action, nor at the time pay any part of the purchase money, etc. Stat. Frauds, as re-enacted in Laws of 1897, chap. 418, known as the Personal Property Act.

A careful reading of the statute shows that it applies to a contract for the sale of a thing in action and not to a consummated sale. The assignment of the thing in action having been actually made by plaintiff's assignor and delivered to and accepted by the defendant, the case is one for the purchase price of a consummated sale of a chose in action and not upon a contract for the sale of a thing in action, and therefore does not come within the operation of the Statute of Frauds. Thomas v. Dickinson, 12 N. Y. 371; Tyler v. Church, 54 id. 632; Van Valkenburg v. Croffut, 15 Hun, 149; Smart v. Smart, 24 id. 129.

The complaint is framed upon the theory of a sale of the chose in action and an agreement to pay for the thing sold and delivered.

The judgment must be affirmed, with costs.

CLARKE and GREENBAUM, JJ., concur.

Judgment affirmed, with costs.

ISAAC STEINHAUS, Appellant, *v.* THE ENTERPRISE VENDING MACHINE CO., Defendant, WILLIAM N. FUNK, Respondent.

APPEAL from an order of the Special Term of the City Court of the city of New York, granting the motion of William N.

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Funk to compel plaintiff's attorney to accept service of his notice of appearance and answer.

Klein & Burkan, for appellant.

Reno R. Billington and Louis W. Dinkelspiel, for respondent.

FREEDMAN, P. J. This is an action against a foreign corporation for damages arising from a breach of warranty of certain machines. The summons and complaint were served on William A. Funk, as managing agent of the defendant corporation, on October 29, 1902. Funk served a notice of appearance and an answer by him, as "the party on whom the summons and complaint herein was served." The answer sets up a general denial and a plea of abatement to the effect that he is not an officer or agent of the defendant corporation, and has no interest in the cause of action set forth in the complaint. Immediately after receipt of said notice of appearance and answer the plaintiff's attorneys returned the same to the attorney subscribed thereto, with notice indorsed on each to the effect that William N. Funk was not the defendant in this action, nor a party thereto, and that an appearance and answer on his part were, therefore, unauthorized.

William N. Funk thereupon moved at Special Term for an order compelling the plaintiff to accept service of said notice of appearance and answer. In his motion papers he admitted that prior to October 20, 1902, he was the agent of the defendant corporation, though he denied having been its managing agent, and then alleged that on said 20th day of October, 1902, he severed all connection with the defendant and has since been in no way connected with it.

The answering affidavits showed, among other things, that Funk had notice that no claim was made against him, and that the process served upon him was intended solely for the defendant corporation; that no person has been designated by the defendant upon whom process can be served in this State; and that Funk represented himself as the managing agent of the defendant both before and after the service of the summons.

The motion was granted upon the authority of Lederer Amusement Co. v. Pollard, 71 App. Div. 35, and from the order granting the same the plaintiff appealed to this court.

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At common law, if the wrong person was served, his remedy was to appear and plead in abatement. Mann v. Carley, 4 Cow. 148. Since the Code it has been held in Miller v. Stettiner, 22 How. Pr. 518; Gannon v. Myars, 11 Civ. Pro. 187; and Barney v. Northern Pacific R. R. Co., 56 How. Pr. 23, that such a plea in abatement is still available by answer.

In the recent case of Lederer Amusement Co. v. Pollard, 71 App. Div. 35, it was held that where there has been service of summons, two remedies are open to the person claiming to have been wrongly served, viz.: either to appear in a form of appearance indicating that the summons has been served upon the wrong individual, and if no attention is paid to this, after the complaint is received, to formally answer and notice the case for trial, or to move to set aside the service on the ground that a mistake has been made. This decision, although made without reference to any authority, would, if applicable to the case at bar, be binding upon this court, as the latest exposition of the law upon the point under consideration, and call for an affirmance of the order appealed from.

But I am of the opinion that neither it nor the other cases before cited are applicable to the present case. The reason of the rule permitting appearance and answer is to enable a person wrongly served and yet sought to be held to plead that he is not liable to the plaintiff because he is not the person against whom the plaintiff's alleged claim exists. In the present case, William N. Funk, before he made his motion, had been notified in writing to the effect that no claim was made against him individually which protected him completely, and yet he attempted to compel the plaintiff to accept an answer which, in addition to a denial of any connection on his part with the defendant corporation, also contained a general denial of the merits of the complaint. This attempt was not made in self protection, but unmistakably in the interest of the defendant corporation, for in his affidavit he averred that "plaintiff's attorneys intend to enter judgment against the said Enterprise Vending Machine Co.," and then asked that "all proceedings on the part of the plaintiff and his attorneys be stayed in the above entitled action until five days after the service of notice of entry of an order determining this motion." William N. Funk should not have been permitted to succeed in this attempt to answer upon the merits for the benefit of the defendant exclusively. Nor should the defendant corporation be permitted to question the validity of the service in the underhanded manner

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in which it was attempted. As it stands the case falls within the reasoning of Smith v. Jackson, 12 Civ. Pro. 428.

The order appealed from should be reversed, with costs, and the motion denied, with ten dollars costs.

CLARKE and GREENBAUM, JJ., concur.

Order reversed, with costs, and motion denied, with ten dollars costs.

BENJAMIN BLUM, Appellant, *v.* CLARA DABRITZ, as Executrix, Etc., of EDWARD DABRITZ, Deceased, Respondent.

APPEAL by plaintiff from interlocutory judgment of the City Court of the city of New York, and the order on which it was entered, sustaining the demurrer to plaintiff's complaint interposed by defendant as executrix.

Blandy, Mooney & Shipman (Andrew J. Shipman, of counsel), for appellant.

Christian G. Moritz, for respondent.

FREEDMAN, P. J. The complaint shows that the plaintiff after having occupied for a number of years certain premises under a lease made to him by Edward Dabritz, the testator of defendant, which lease contained a covenant of quiet enjoyment, was, before the expiration of said lease, wrongfully and illegally dispossessed and ejected from the demised premises by the defendant, claiming to act as executrix of the testator; that the defendant accomplished this result by means of summary proceedings instituted by her as landlord against the plaintiff as tenant, and one alleged undertenant; that said proceedings were wholly void; that, he, plaintiff had no notice or service in said proceedings; that the final order and warrant of removal were granted against him by default; that on his appeal said final order was reversed and a new trial ordered; that upon such new trial a final order was again granted against him; that on his appeal the last-mentioned final order was reversed and the summary proceedings and defendant's petition were dismissed, with costs; that restitution was denied to plaintiff on the ground that the defendant, immediately after plaintiff's removal, had leased said premises to another tenant for the remainder of the term; and that by reason of said

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wrongful and unlawful acts the plaintiff sustained certain specified damages. The complaint further alleges the death of Edward Dabritz, leaving a last will and testament; the probate of said will; the appointment of the defendant as executrix thereof; and also that by said will the defendant was made the sole residuary legatee and devisee, including the premises in question.

Upon these allegations the plaintiff's complaint proceeds against the defendant individually and as executrix, and the defendant answered individually, but demurred as executrix, upon the ground that the complaint does not state facts sufficient to constitute a cause of action against her as executrix.

The demurrer was sustained by the City Court and judgment entered thereon, and the plaintiff appealed to this court.

The action is not one for a breach by the defendant as executrix of the covenant of peaceable and quiet possession.

Nor does the complaint show that the summary proceedings were instituted by the defendant as executrix because of a violation by the plaintiff of some of the terms or conditions of the lease.

The complaint is for a naked tort, viz.: for a wrongful and illegal eviction under color of proceedings wholly void and without notice to plaintiff. It is, therefore, for a tort for which the estate of Edward Dabritz is not liable. The rule is well settled, that for a tort committed by an executor he is liable individually and not in his representative capacity. Watson v. Moriarty, 59 N. Y. Supp. 73; 11 Am. & Eng. Encyc. of Law (2d ed.), 942.

And this is so where a tort is committed by an executor in the continuation of the conduct of the business of the testator under the provisions of the will. McCue v. Finck, 20 Misc. Rep. 506; 46 N. Y. Supp. 242.

Even the contracts of a business, carried on by an executor under the authority of the will, are his individual contracts. Willis v. Sharp, 113 N. Y. 591; 11 Am. & Eng. Encyc. of Law (2d ed.), 974.

The case, therefore, does not fall within the special provisions of section 1815 of the Code of Civil Procedure, because the facts alleged do not show a liability in a representative capacity, nor make it uncertain whether it so exists or is against the executrix individually. On the contrary, it clearly appears that whatever liability does exist, is against the defendant individually.

The words "individually and as executrix" cannot be treated as surplusage, for the reason that the body of the complaint and

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the brief of plaintiff's counsel upon this appeal both show that the pleader intended to hold the defendant liable in both capacities.

The judgment should be affirmed, with costs.

CLARKE and GREENBAUM, JJ., concur.

Judgment affirmed, with costs.

JOHN F. SCARRY, Appellant, *v.* THE METROPOLITAN STREET RAILWAY CO., Respondent.

APPEAL from a judgment of the City Court of the city of New York, entered on an order of the General Term of the said court, affirming a judgment in favor of the defendant, entered on the verdict of a jury, and an order denying a motion for a new trial.

Kneeland, LaFetra & Glaze (Edward B. LaFetra, Stillman F. Kneeland, of counsel), for appellant.

Henry A. Robinson (Addison C. Ormsbee, Arthur Ofner, of counsel), for respondent.

GREENBAUM, J. This is an action for damages for personal injuries. The plaintiff was a passenger on one of the defendant's cars, and in his complaint he alleges, that at Sixth avenue and Fourteenth street "he was in the act of getting off" the car, "after the said car had stopped," and that while in the act of alighting, and "without any fault or negligence on his part, he was violently thrown from said car," and "the injuries suffered by said plaintiff were caused by the wrongful acts, neglect, default and want of proper care and skill of the defendant, its agents and servants aforesaid, who suddenly started said car."

Defendant moved for a dismissal on the opening remarks of the plaintiff's counsel. The grounds upon which the motion was made were not stated, so far as the record shows, but upon the renewal of the motion, at the close of the plaintiff's case, it is made clear that the plaintiff's counsel had stated that "the car was slowly moving" instead of stating that it was at a standstill when the plaintiff attempted to alight. The defendant contended that this variance between the allegation in the complaint that the car "had stopped" and the fact that it was coming to a stop, was fatal to a recovery.

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Before the trial proceeded the court afforded an opportunity to the plaintiff's counsel to determine whether he relied upon a "stopping of the car" or a slow motion. Plaintiff's counsel replied: "I will stand on the complaint as set forth, that the car stopped. If there is some variance in the testimony I will move for an amendment in that respect." The court responded "Very well."

Plaintiff testified that the car had come to a full stop, before he attempted to get off. A witness named Gebhart, called in plaintiff's behalf, testified that "the car was about to come to a stop; when it was almost to a stop, it gave one lunge ahead, and Scarry went off this way and his head hit up against the pillar" of the elevated structure.

"By the court: Q. Then the car did not stop at all at Fourteenth street, is that the version? A. No; I don't say that. It came almost to a sudden stop and then it suddenly started ahead. Oh, no; it stopped then. After the car was about to come to a stop. It was about to stop and all of a sudden it gave a lunge or sudden jerk and then the accident happened, and then it went about a few feet further, and then the car stopped."

After both sides had rested, the plaintiff's counsel moved "to conform the pleadings to the proof." The court: "The pleadings conform to the proofs now, do they not?" Plaintiff's counsel: "There may be some question about it; I move to conform the pleadings to the proof." The court: "All right; your pleadings will conform to the proof."

After both sides had summed up, the court in its charge instructed the jury that "the version of Gebhart is that the car never came to a full stop at all, until after the accident. If the accident happened as Gebhart says it did, the plaintiff would have a cause of action against the defendant, but he could not stand upon the complaint which he sues upon in this action." Plaintiff's counsel excepted to the charge "in so far as you say in substance that if the jury believes the testimony of the plaintiff's witness Gebhart, that then plaintiff cannot recover. The court: "I do not so charge."

Thereafter the court of its own motion stated: "Now, with reference to your request to amend your pleadings to conform to the proof, Mr. La Fetra (plaintiff's counsel) an exception was taken to that ruling." Defendant's counsel: "I took an exception." The court: "I will reconsider that, for this reason,

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that it would be an utter inconsistency to rule that the pleadings should conform to the plaintiff's proof when there is a direct conflict between the plaintiff and his witnesses. One says that the car stopped and that while he was trying to alight the car went ahead; and the other says that the car did not stop, therefore, I shall decline to amend the pleadings to conform to the proof." Plaintiff's counsel: "Will your honor hear me before you decide that motion?" The court: "It is not necessary for your preservation that these pleadings should be conformed to the proof. You have the plaintiff's version and upon his version you stand. The jury will simply take into consideration the testimony of your witness Gebhart and the testimony of the other witnesses." Plaintiff's counsel: "I except. I will except to your honor's now reconsidering your motion to allow the pleadings to conform to the proof and ask your honor to charge the jury in this way. As I conceive the law, it is simply this: The question is whether or not Scarry exercised the same degree of care that an ordinary person under ordinary circumstances would exercise."

The respondent relies upon the case of Patterson v. Westchester Electric R. Co., 26 App. Div. 336, and Anderson v. Third Ave. R. R. Co., 36 id. 310, in support of the court's rulings.

In the Patterson case there was no amendment of the pleading requested, and as was pointed out by Mr. Justice Cullen in his opinion in Anderson v. Third Avenue, *supra,* on page 311, from which we will quote, the reversals which were ordered in both of these cases were based upon the errors of the trial judges in refusing to charge the jury in a way that would present the theory of the defense, which was that the war was in motion, and that the accident was due entirely to that circumstance. Judge Cullen says: "But I reach this conclusion only because the testimony in the case presented two irreconcilable theories of the manner in which the accident was occasioned, and a finding that the car was moving when the plaintiff attempted to get on was fatal to the plaintiff's theory. But it must not be understood that every inaccuracy or mistake made in the testimony of a witness as to the manner in which an occurrence has transpired, is fatal to the party's claim. When the credibility of a witness is for the jury to pass upon, the jury is not limited to rejecting or accepting his testimony in whole; they may accept part and

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reject part. We can well suppose a case in which the jury might find that the plaintiff was in error, or even untruthful, in his statement that the car was at rest when he started to board it or alight from it, and yet the negligence of the company and the plaintiff's own freedom from contributory negligence might sufficiently appear from the evidence, despite the fact that the car was moving. In such a case a finding that the car was moving at the time of the accident would not defeat the plaintiff's recovery, even though he contended that in fact the car was at rest. I fear that some expressions in the opinion delivered in the case of Patterson v. Westchester Electric R. Co., 26 App. Div. 336, unless construed strictly with reference to the precise facts of that case, may prove misleading as announcing a rule of law not invariably applicable; and I do not wish that there should be misunderstanding on the question, as there was some irreconcilable conflict of theory in that case as in the one before us now."

It will thus be seen that it was not necessary in the Patterson case for the court to have said: "The effect of such a change would be to authorize a recovery upon evidence which disproves the cause of action averred in the complaint, and which is opposed to her proof. Many authorities condemn the plaintiff's claim. (Caven v. City of Troy, 15 App. Div. 163; Neudecker v. Kohlberg, 81 N. Y. 296; Southwick v. First Nat. Bank, 84 id. 420.)"

Caven v. City of Troy, 15 App. Div. 163, was a case where the action upon which a recovery was held, was for an act of negligence not stated in the complaint, and where different questions of law and fact would be applicable to the new facts established upon the trial, than to the cause of action alleged in the complaint.

Neudecker v. Kohlberg, 81 N. Y. 296, was a case in which the cause of action was one *ex delicto* and it was sought to convert it into one *ex contractu*.

In Southwick v. First Nat. Bank, 84 N. Y. 420, the plaintiff failed to prove the cause of action set up in the complaint. No amendment of the pleading was asked for or ordered and a judgment was permitted "upon a cause of action entirely separate and distinct from that alleged." The following extract from the opinion of the court in that case (Judge Earl writing), page 428, is instructive: "The Code requires that the complaint must contain a plain and concise statement of the facts constituting

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the cause of action, and that the pleadings must be liberally construed with a view to substantial justice between the parties; and in section 723 ample power is conferred upon the court to amend pleadings at any stage of the action, and where the amendment does not change substantially the claim or defense, to conform the pleadings to the facts proved. Here, although the defect in the complaint was pointed out in due time upon the trial, no amendment was asked for or ordered. This is not a case where the pleadings can, after the trial be conformed to the proof, as such an amendment would change substantially the claim of the plaintiff as alleged. This is not a case of mere variance or mere defect, but a case of failure to prove the cause of action alleged in its entire scope. Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary. Here the defendant was brought into court to answer a complaint that he had violated his promise to apply the proceeds of the draft, and he took issue upon the alleged promise and when he came to trial he was held liable, not for any breach of promise but for the money paid by the Boston firm on the ground of the conversion of the draft, or the mistake of facts which induced the payment of the money."

It is, therefore, manifest that the doctrine that the judgment must be *secundum allegata et probata,* which is upheld in the decision cited in the Patterson case, should have no application to a case such as is here presented, unless the fact that the car was "slowly moving" or "slackening up" instead of being brought to a "stop," changed the cause of action or added a new one.

In the case of Rosenberg v. Third Avenue R. R. Co., 47 App. Div. 326, where a situation similar to that here presented existed, the learned justice who wrote the opinion in the Patterson case, stated that "no new cause of action was added" where an amendment like that here presented was granted.

The complaint in this case shows that the liability of the defendant was predicated upon the negligent act of the employee, in suddenly and unexpectedly starting up the car, while the plaintiff was in the act of alighting.

It might well be argued that in view of the other specific alle-

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gations it was unnecessary to allege the fact that the car had stopped, when the plaintiff attempted to leave. So far as the defendant's negligence is concerned, it is wholly immaterial whether the car was first brought to a standstill and was then suddenly and without warning put in motion, or whether while in the act of coming to a standstill, it accelerated its speed without any notice to the passenger. The act of the plaintiff in attempting to alight while the car was still in motion, bore solely on the question of his contributory negligence, and the variance in the proof in this respect, simply required an appropriate instruction to the jury, that in such a case it was their province to consider and to say whether, from the facts established, the plaintiff acted as an ordinarily prudent man would have acted under similar circumstances.

The cause of action thus arises out of the negligent act of the defendant at the moment when the passenger was justified in believing that it was safe to alight, and while it is true that no recovery could be had unless the injured one was himself free from negligence, it is difficult to see how the defendant could be misled or injured by a variance between the allegation that the car had stopped and the proof that it was slowly moving or was about coming to a stop.

Suppose the plaintiff's testimony and that of several disinterested witnesses called by him was to the effect that the car had stopped, and the proof of the defendant's witnesses only differed in that the car was slowly moving at the time the passenger attempted to alight, would it be proper for the trial court to instruct the jury that if they believe the defendant's witnesses, there could be no recovery? Or suppose the plaintiff had alleged that while the car was slowly moving and about coming to a stop in order to permit him to alight, the car suddenly and without warning was started, etc., and threw him to the ground. Would such an allegation defeat a recovery, without amendment, if it appeared at the trial, that the car had in fact came to a stop when the plaintiff attempted to alight?

As the only effect of a variance between a pleading alleging "a stop" and the proof that the car was "moving" would be to present a situation more favorable to the defendant, on the question of the plaintiff's contributory negligence, it is not apparent how any injustice would thereby come to the defendant.

As was stated by Mr. Justice Earl in the Southwick case, *supra,*

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the Code requires that "the pleadings must be liberally construed with a view to substantial justice between the parties," and an amendment to conform the pleading to the proof is justified where it "does not change substantially the claim or defense."

While it is doubtful if any amendment was necessary in this case, it is clear that in any event, an amendment to conform the pleading to the proof should not have been refused. The learned trial justice evidently labored under the impression that the allegation of "a stop" was inconsistent with the proof of "motion," and thereon based his reconsideration of his ruling on the motion to amend.

The plaintiff was justified in proceeding to trial upon the assumption that in case an amendment was necessary it would be granted, and he was prejudiced by being lulled into the belief, before summing up to the jury that the amendment had been allowed. He had a right in addressing the jury to rely upon the previous ruling of the court respecting the amendment.

The judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, P. J., and CLARKE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

MAX BIRNSTEIN, Respondent, *v.* THE STUYVESANT INSURANCE Co., Appellant.

APPEAL from a judgment of the City Court of the city of New York, entered on an order of the General Term of said court, affirming a judgment in favor of the plaintiff, entered upon the direction of a verdict.

Gillender, Fixman & Mumford (Ezekiel Fixman, William W. Mumford, of counsel), for appellant.

Max D. Steuer (Abraham S. Levy, associated), for respondent.

GREENBAUM, J. The action is brought upon a policy of fire insurance. Waldman, the broker who procured the insurance for the plaintiff, testified that he originally applied to the defendant's

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agent for insurance on property situated at 1583 *First* avenue; that when he so applied it was on a written memorandum or slip referring to *First* avenue which he left with defendant's agent; that a policy was issued by the defendant and delivered to Waldman covering property situated at 1583 *Third* avenue; that the latter upon discovering the *error of the defendant* made a new application for a policy of *First* avenue; that a new policy was issued on *First* avenue; that subsequently when he paid the premium, the clerk of the defendant told him to bring back one of them as "there are two there for Max Birnstein and *I* made a mistake;" that thereupon Waldman in turn made a mistake on his part, and returned the policy covering the property stated therein to be situated at 1583 *First* avenue (which was the correct policy) instead of the so-called *Third* avenue policy.

The testimony of the defendant only contradicts that of the plaintiff in so far as it shows that the application for the insurance was prepared by defendant's clerk in Waldman's presence or upon his dictation. In any event, however, in view of a direction having been asked by both parties, every reasonable intendment upon the facts, in favor of the party, in whose behalf the judge directed the verdict, will be assumed.

It is undisputed that a policy covering the cloak establishment of the plaintiff and certain machinery and fixtures at 1583 *First* avenue, was issued; that a fire took place in plaintiff's premises on First avenue; that plaintiff had no place of business on Third avenue, and there is no proof that any other person had such business there as was covered by both policies. The defense substantially relies upon a surrender of the *First* avenue policy and a cancellation thereof by the defendant. If this defense is made out there can be no recovery here.

The facts upon which the defendant relies to support its defense are, that Waldman was the agent of the plaintiff; that as such agent he surrendered the First avenue policy; that upon such surrender it was canceled by the defendant; that defendant never made a survey of the premises and hence did not know who occupied the Third avenue premises nor for what purposes they were used; that the only policy in force issued by the defendant in favor of the plaintiff was the one covering the Third avenue premises.

The statement of the facts shows that the defendant in the first instance made a mistake in writing a memorandum for a

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policy covering Third avenue and issuing a policy on those premises notwithstanding the written pencil slip of Waldman called for a policy on First avenue and that defendant knew that the intention of Waldman was, when he asked for a proper policy covering First avenue, to correct the mistake the defendant had made. It may, therefore, be assumed that the defendant knew that when Waldman, by mistake, surrendered the First avenue policy, that he intended in fact to surrender the Third avenue policy, and as already shown the testimony of Waldman establishes the fact that defendant's agent asked for a return of the policies on account of the mistake.

To effectuate a legal surrender and cancellation, it is evident there must be an intent of both parties shown on the one hand for a cancellation of the given policy and on the other, an acquiescence therein, followed by an actual cancellation. Or, such a state of facts must exist that a desire was expressed for a cancellation by one party through a mistake, if you please, and that the other, in ignorance of the mistake, acted thereupon and surrendered some rights. In this case, however, it cannot be said that either party intended that a cancellation be effected of the *First* avenue policy, and it is difficult to understand how any of the rights of the defendant were affected by the erroneous cancellation.

Again, unless the broker Waldman had authority to surrender, his act of surrender would not be binding upon the plaintiff. All that the testimony shows is that he had full authority to *procure* insurance in whatsoever company he chose. This authority he exercised. Having exercised it, his authority ceased. He had no authority to surrender the policy and leave the plaintiff uninsured, although he may have had the power to substitute other insurance, if he saw fit to do so.

The policy of *First* avenue having been thus legally issued to the plaintiff, no one could surrender it to the defendant other than the plaintiff himself or his duly authorized agent. In either aspect of the case, therefore, the policy on First avenue was never legally cancelled and was in full force and effect at the time of the fire, even though it was then in defendant's possession.

This conclusion is rendered more certain by the fact that, although it may be here assumed that no survey was ever made of the premises by any one representing the defendant, the law will presume that the defendant knew what it was insuring. In the

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absence of proof that it had no knowledge of the kind of business conducted on the premises on Third avenue (if, indeed, any business was there conducted), it must be assumed that the defendant was not led into believing that it was insuring the plaintiff for any of his effects situated on Third avenue, and, therefore, it was never intended between the parties to accomplish a surrender of the First avenue policy.

The judgment must be affirmed, with costs.

FREEDMAN, P. J., and CLARKE, J., concur.

Judgment affirmed, with costs.

ANNETTE M. OSBORNE, Respondent, *v.* WASHINGTON SELIGMAN, Appellant.

APPEAL by the defendant from a judgment of the City Court of the city of New York, entered on the verdict of a jury, in favor of the plaintiff.

Seligman & Seligman (Eugene Seligman, of counsel), for appellant.

Epstein Bros. (Jesse S. Epstein, of counsel), for respondent.

GREENBAUM, J. The sum of $2,000 damages was awarded to the plaintiff in this action for an alleged assault and battery.

The only witnesses to the occurrence out of which this action arises were the plaintiff and the defendant, who flatly contradicted each other. The plaintiff testified that the defendant struck her and the defendant unequivocally denied this and asserted that he never in his life laid hands upon the plaintiff.

Upon cross-examination of the plaintiff, the defendant's counsel sought to impeach her character by asking questions which tended to show that she was a lewd and abandoned woman, devoid of moral sense. The learned trial judge excluded all questions touching this inquiry, and in his charge to the jury he stated "there has been some question raised here as to the character of the plaintiff, but I excluded the testimony. The character of the plaintiff is not an issue here any more than the character of the defendant."

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It is evident that the court ruled out all the questions relating to the character of the plaintiff, upon her cross-examination, when she offered herself as a witness in her own behalf in support of the charge which constituted the gravamen of her complaint, upon the ground that the character of the plaintiff was not in issue. It is undoubtedly true that the character of the plaintiff was not an issue in the case, but the proof sought to be made had a most direct and pertinent bearing upon the credibility of the plaintiff as a witness upon the vital fact in the case.

It seems to be a well-settled rule that it is permissible to interrogate a party, who is a witness, with respect to acts of misconduct tending to impugn his credibility. People v. Casey, 72 N. Y. 393, 398; People v. Webster, 139 id. 83; Meyer v. Suburban Home Co., 25 Misc. Rep. 688. The scope of such cross-examination is largely controlled by the trial judge in the exercise of a wise discretion, but in this case the counsel for the defendant made numerous ineffectual efforts to cross-question the witness as to her past life, and after repeated exclusions of such questions, to all of which due exceptions were taken, the court frankly said: "I will exclude that line of examination, and you may except to my ruling, and that will protect you amply on an appeal." It thus appears that no opportunity was accorded the defendant's counsel to probe into the conduct and life of the witness, with respect to matters which if proved would tend most materially to affect her credibility.

It has been repeatedly held that men and women whose lives indicate an abandonment or lack of moral principles, and show them to be lewd and debased characters, void of shame or decency, have not usually a great respect for the truth or the sanctity of an oath. Winston v. Winston, 165 N. Y. 553; Shepard v. Parker, 36 id. 517.

The defendant was clearly entitled to break down, if he could, upon cross-examination, the effect of plaintiff's evidence, by interrogating her respecting the matters that the attempted cross-examination indicated.

The authorities cited by the respondent refer to cases where it was attempted to establish the bad character of a party by witnesses who were produced to testify to instances of misconduct on his part. The law seems to be well settled that such a practice will not be permitted, but it has no bearing upon the situation here presented.

The right to the cross-examination of a witness, with respect

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to his life, having a direct bearing upon his credibility, seems to be well recognized, and for the manifest error in excluding the questions bearing upon her past life put to the plaintiff, and without passing upon other exceptions presented, the judgment must be reversed.

FREEDMAN, P. J., and CLARKE, J., concur.

Judgment reversed, new trial ordered, with costs to appellant to abide event.

ETTA FORGOTSON, Respondent, *v.* JACOB BECKER et al., Appellants.

APPEAL by the defendants from an order, interlocutory judgment, and final judgment entered thereon in the City Court of the city of New York, sustaining a demurrer interposed by plaintiff to defendants' answer in an action on a promissory note.

Henry Kuntz and Edward A. Brown, for appellants.

James C. De La Mare, for respondent.

CLARKE, J. In the order and decision of the trial justice sustaining the demurrer it is recited that the attorney for the plaintiff appeared in support of the demurrer, and no one appeared in opposition thereto. An interlocutory judgment was thereupon entered, directing that in case the defendants do not within six days after service of a copy of the interlocutory judgment serve an amended answer and pay costs, then plaintiff may enter final judgment. The defendants failed to amend or pay costs, and final judgment was entered against them. The defendants have appealed from both the interlocutory and final judgments. The plaintiff contends that no appeal lies under these circumstances. Section 1294 of the Code of Civil Procedure provides: "A party aggrieved may appeal, in a case prescribed in this chapter, except where the judgment or order, of which he complains, was rendered or made upon his default." An order containing a recital that the motion is granted after hearing counsel for the moving party and no one appearing in opposition thereto, is granted on default, and no appeal can be taken therefrom. Matter of Peekamose Fishing Club, 5 App. Div. 283. As no one appeared in opposi-

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tion to the demurrer, the order upon which the interlocutory judgment was entered was made on default, and no appeal lies therefrom. The final judgment is dependent upon the interlocutory judgment. It was entered upon defendants' failure to comply with the terms imposed, as matter of course, without further motion. "The final judgment carries forward the adjudication of the interlocutory judgment and completes the full adjudication of the rights of the parties." Avery v. Woodin, 44 Hun, 266. And an appeal from a final judgment brings up for review the interlocutory judgment which determined the issue arising upon the demurrer. Kerr v. Dildine, 60 Hun, 315. The defendants, therefore, cannot appeal from the final judgment. In Kerr v. Dildine, 14 Civ. Pro. 176, an interlocutory judgment had been entered on the determination of an issue of law, joined by the defendant's demurrer to the complaint, and leave to answer granted on condition of the withdrawal of the demurrer and payment of costs. The *query* was raised whether failure to answer in such case constitutes a default within the meaning of the Code provision. The question was not there answered, as the case was decided on another point, and it is not necessary to decide it in the case at bar, as we consider the failure to appear in opposition to the demurrer the fatal default. In Kerr v. Dildine, 60 Hun, 315, the same appeal was again before the General Term of this court, but it appeared that the defendant duly argued his demurrer and appeared to oppose the entry of final judgment. The court said: "The defendant has not been in default at any stage of the action. * * * In the cases principally relied upon by the respondent, there was not only failure to answer but failure to oppose the application for judgment, so that in those cases judgment was, in fact, taken by default." The clear purpose of the Code provision is to insure compliance with the wise plan of our procedure, that argument on any given point of law or fact be first presented to a trial judge. To admit this appeal would open the door to many arguments before an appellate court, when the matter had never been contested in the court below. Judge Earl, in Flake v. Van Wagenen, 54 N. Y. 25, quoting Gelston v. Hoyt, 13 Johns. 561, says: "A party acts against good conscience if he will not come forward and disclose his reasons, when called upon by the proper tribunal, but reserves for himself another court * * *. The very theory and constitution of a court of appellate jurisdiction only is the correction of errors which a court below may have committed; and a court below cannot be said to

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have committed an error when their judgment was never called into exercise, and the points of law were never taken into consideration, but was abandoned by the acquiescence or default of the party who raised it." The failure to appear and oppose the demurrer constitutes a default within the meaning of section 1294 of the Code, because the reasons for overruling the demurrer were not presented to the court. The demurrer was not contested and therefore acquiesced in. In Flake v. Van Wagenen, 54 N. Y. 27, Judge Earl says: "However improper the evidence may be which one party gives at the circuit, and however erroneous the charge of the judge may be, the other party cannot, upon appeal, complain, unless, at the time he made the proper objection, and thus called for the exercise of the judgment of the judge, upon the matter complained of. In the absence of any objection he will be held to have acquiesced; and, for the same reason, if a party permits an order or judgment to be taken against him by default, when he has been notified to appear, and has thus had an opportunity to object, he will be deemed to have acquiesced; and afterward he can no more attack the same upon appeal than he could if he had expressly assented to the order of judgment."

The definition of default as a failure to appear and contest a point of law or fact by presentation of counter argument or proof has been applied in many cases. Where there has been no opposition to a referee's report or when there has been a stipulation that judgment be entered thereon, no appeal lies from such judgment. Boyd v. Bigelow, 14 How. Pr. 511. Mr. Justice Marvin, construing the right to appeal under an early statute, says: "This will not include judgments, orders or final determinations, upon default, or rendered or made upon stipulation. The General Term cannot be called upon to examine the case until it has been presented, contested and passed upon at a Special Term." Smith v. Velie, 60 N. Y. 106. But on the other hand, although no motion had been made to set aside the referee's report, it was held that an appeal lies, where the merits had been argued on a motion to confirm the report and for judgment thereon. Kellogg v. Clark, 23 Hun, 393. So also, no appeal lies from a judgment, entered upon an inquest, taken at the trial. Keller v. Feldman, 2 Misc. Rep. 179; Greenleaf v. Brooklyn, etc., R. R. Co., 37 Hun, 435. Where, on motion, duly noticed, an answer is stricken out as sham or on the ground that it is frivolous, and no one appeared in opposition to such motion, a judgment rendered thereon is by default and no appeal lies. Flake v. Van

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Wagenen, 54 N. Y. 25; Innes v. Purcell, 58 id. 388; Hoag v. Hatch, 16 Civ. Pro. 118. The proper remedy in the case is not to appeal but by application to the court for an order opening the default. Oliver v. French, 80 Hun, 175.

FREEDMAN, P. J., and GREENBAUM, J., concur.

Appeal dismissed, with costs.

ETTA FORGOTSON, Respondent, *v.* JACOB BECKER and ISAAC BRAFFMAN, Appellants.

APPEAL from an interlocutory judgment, City Court, Special Term, sustaining a demurrer to separate defenses in defendants' answer.

Henry Kuntz and Edward A. Brown, for appellants.

James C. De La Mare, for respondent.

CLARKE, J. This is an action for rent. The complaint sets forth the usual allegations and avers that the defendants "entered in the possession of the demised premises and have ever since been in the possession thereof." The answer is most informally drawn. None of the allegations of the complaint are denied and in several separate paragraphs, matter is pleaded by way of separate defense and counterclaim. The plaintiff demurred to the averments as to the separate defense on the ground that the same is insufficient in law on the face thereof. The validity of the counterclaim is not raised by the pleadings and the only question on appeal before this court is whether any of the allegations set forth in the answer constitute a valid defense. Considering the answer as a whole the various allegations resolve themselves into two defenses; an alleged surrender and acceptance of the premises, and alleged fraud in procuring the lease. Neither of these defenses is well pleaded. The failure of the defendants to deny the allegation in the complaint that the defendants entered and have ever since been in possession is fatal. As this allegation is not expressly denied it must be deemed admitted as true for all purposes of the action. Code Civ. Pro., § 522; Dunham v. Cudlipp, 94 N. Y. 129; Fleischmann v. Stern, 90 id. 110; Conselyea v. Swift, 103 id. 604. The defendants

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cannot admit that they are in possession and at the same time aver surrender and acceptance. Moreover, the first defense is not well pleaded as it is not alleged whether or not the surrender was made before the rent accrued for which the plaintiff has brought this action.

The admission of continued possession also renders the defense of fraud unavailable. It was held in Barr v. N. Y., L. E. & W. R. R. Co., 125 N. Y. 263, that where the party, after knowledge of the fraud and an opportunity to rescind, still retains the possession and use of the property without any offer to return the same, the fraud is waived and the contract becomes valid by acquiescence. That was an action for rent wherein the defendants sought to avail themselves of the invalidity of the lease because of its fraudulent inception. Judge Gray says, at page 271: "There is something repugnant to our sense of justice, and a seeming subversion of ideas respecting property rights, in the position that property may be retained and enjoyed, and payment of the stipulated rental therefor refused by its holder, on the plea of fraudulent practices, or because of the immoral conduct involved in the making of the contract by which the property was transferred and the obligation to pay imposed." And in Lynch v. Sauer, 16 Misc. Rep. 1, this court held that fraud is not available as a defense to an action for rent after failing to repudiate the agreement upon learning of the fraud, as such failure is a complete ratification of the contract. The demurrer to the separate defenses must, therefore, be sustained.

Judgment affirmed, with costs, with leave, upon payment thereof within ten days, to serve an amended answer.

FREEDMAN, P. J., and GREENBAUM, J., concur.

Judgment affirmed, with costs, with leave, upon payment thereof within ten days, to serve amended answer.

THE MUNGER VEHICLE TIRE CO., Appellant, *v.* THE RUBBER GOODS MANUFACTURING CO., Respondent.

APPEAL from an interlocutory judgment, Special Term, City Court, sustaining defendant's demurrer to the amended complaint.

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Goldsborough, Villard & Warner (Richard F. Goldsborough, Harold G. Villard, Ernest G. Lorenzen, of counsel), for appellant.

Zabriskie, Burrill & Murray (Hamilton M. Dawes, of counsel), for respondent.

CLARKE, J. Plaintiff and defendant are foreign corporations. The complaint alleges that at the city and county and State of New York, plaintiff deposited with defendant, money, checks and drafts, amounting to the sum of $1,230.60, at specified dates, and thereupon, at said place, the defendant promised to return and repay the same to the plaintiff, with interest, upon demand. Defendant demurs upon the ground that the court has not jurisdiction of the person of the defendant, nor of the subject of the action and that the complaint does not state facts sufficient to constitute a cause of action. Both parties being foreign corporations, section 1780 of the Code of Civil Procedure applies. Appellant concedes that unless its complaint comes within subdivision 1 thereof the demurrer was properly sustained. That provision of law is as follows: "Section 1780. An action against a foreign corporation may be maintained by another foreign corporation * * * in one of the following cases only:

"1. Where the action is brought to recover damages for the breach of a contract, made within the State."

Plaintiff claims that the allegation of a deposit of money made with the defendant within the State, which defendant within the State promised to return and repay with interest upon demand, sets forth an action to recover damages for the breach of a contract made within the State. Defendant claims that what is alleged does not constitute an action for damages for the breach of a contract, but is an action for money had and received and that such an action is not an action upon a contract. It is quite true that there are cases where the action for money had and received will lie when there is no meeting of the minds, where the obligation to repay is one of law merely, as where one has obtained money from another through the medium of oppression, imposition, extortion or deceit or by the commission of a trespass. Such money may be recovered back, for the law implies a promise from the wrongdoer to restore it to the rightful owner, though this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of

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courts of equity, and in fact are not contracts at all. They are called *quasi* contracts because without being contracts they produce obligations in the same manner as contracts. People ex rel. Dusenbury v. Speir, 77 N. Y. 150.

But such is not this case. Here it is alleged that plaintiff deposited the money with defendant and thereupon the defendant promised to return and repay the same to the plaintiff, with interest, upon demand. That is the allegation of facts constituting a contract. It being also alleged that the deposit and the promise to repay, that is the making of the contract, took place within the city, county and State of New York, the statute is satisfied and the court had jurisdiction.

Judgment reversed. Demurrer overruled, with costs, with leave to defendant to withdraw demurrer and answer over within ten days and upon payment of costs.

FREEDMAN, P. J., and GREENBAUM, J., concur.

Judgment reversed. Demurrer overruled, with costs, with leave to defendant to withdraw demurrer and answer over within ten days upon payment of costs.

MOSES TANENBAUM, Respondent, *v.* MORRIS FREUNDLICH, Appellant.

APPEAL from a judgment of the City Court, entered upon a verdict of a jury, in favor of the plaintiff, and from an order denying a motion for a new trial.

David Steckler, for appellant.

Levi & Halff (Leo N. Levi, of counsel), for respondent.

CLARKE, J. Action by a fire insurance broker to recover damages for breach of contract. The first paragraph of the written contract provides: "That the said firm of I. Tanenbaum, Son & Co., is hereby authorized to and shall, as the agents of the party of the second part and for his account, procure and pay premiums for all fire insurance required by the party of the second part, not less, however than Twenty thousand dollars per year and not less than the market value at any time, of the prop-

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erty insured, for the period of three years from the sixth day of February 1899 to the Sixth day of February 1902, upon Merchandise, machinery, furniture and fixtures, use and occupancy, buildings and rents, contained in or on the building and premises known as numbers 43 and 45 West Fourth street, New York City, in any of the companies named on Schedule 'A' annexed to and forming part hereof, or in such other companies as are or may hereafter be admitted to do business in the State of New York." There is no question on this appeal as to the insurance under the contract and in accordance with the terms thereof having been duly placed upon the merchandise, machinery, furniture and fixtures, in the loft occupied by the defendant as a manufacturer of furs in said building. Nor is there any question raised as to "building and rents." Defendant did not apply for or take out any insurance on "use and occupancy." Plaintiff claims a breach of the contract in that regard and seeks to recover the commissions he would have earned if the "use and occupancy" had been insured upon its market value. Defendant claims he did not require such insurance and, therefore, plaintiff has no claim. But the language of the contract is "for all insurance required by the party of the second part not less however than $20,000 per year and not less than the market value at any time of the property insured." There can be no doubt that the proper construction of that language is that defendant was required through plaintiff to take out insurance at least to the amount of $20,000, and if the market value was in excess of said sum, to the amount of said market value.

Insurance on "use and occupancy" is a modern development of insurance and there are few cases in the books thereon. The Court of Appeals in Michael v. Prussian Nat. Ins. Co., 171 N. Y. 25, has defined the legal meaning of the phrase: "Insurance," on use and occupancy, "evidently, relates to the business use, which the property is capable of in its existing condition. If it is destroyed by fire and its use becomes impossible, then, during the period required for its reinstatement as property capable of use and occupation, the owner is to be compensated according to the terms of the policy; * * * it is a provision for indemnity to the owner of the * * * plant, in the event that it should not continue in the same condition of availability to him." It is usual for such policies to be valued. That is, it is agreed what sum shall be paid for every day that the disability continues and

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upon such policies there can be no dispute as to amount. But no such policies were taken out in this case. One element of the cause of action is the loss of commissions for failure to take out such policies.

As we have seen, defendant was bound to take them out for not less than the market value of said "use and occupancy."

Defendant urges that this being an executory contract the damage by its breach in this regard was so indefinite and uncertain that plaintiff may not recover. We do not agree with that contention. The commissions which plaintiff was to receive, based upon the rates at which the insurance could be placed during the life of the contract, were clearly ascertainable. The damage which he suffered was the logical and proximate result of defendant's breach. The only element of uncertainty was as to the market value of the use and occupancy, but in essence this was no more uncertain than the market value of any commodity at any period or the value of any future executory contract. If this were ascertainable by competent proof, the amount of the damage might then be fixed clearly and definitely. But in ascertaining this market value of the use and occupancy, plaintiff was permitted, over objection and under exception, to prove the net yearly profits made by the defendant in his business. And when the learned court came to submit the difficult questions arising in this case, to the jury, he limited the market value of "use and occupancy" to the consideration of the profits and the fixed charges. But the profits of the business were quite another insurable risk and not at all covered by the phrase "use and occupancy" as distinctly held in Michael v. Prussian Nat. Ins. Co., *supra*.

The precise contention was made in that case that "use and occupancy" was like "freight" earned by a ship; that it was an indemnity against the loss of earnings or profits. But this contention was not sustained. "The terms made use of have not the accepted significance contended for by the appellant, and any doubt or ambiguity should be resolved against it and in favor of the assured. Insurance 'on use and occupancy' evidently relates to the business use which the property is capable of in its existing condition." Id.

The difficulty of ascertaining the value of "use and occupancy" is undoubtedly the reason why a *per diem* allowance is agreed upon between the insurer and the insured. But this is

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not an action on such a policy. It is to recover damages for breach of contract to take out such a policy through the broker. It was fatal error to admit evidence as to profits and to leave to the jury the question whether the profits plus the fixed charges "was a fair estimate of the value of the use and occupancy of those premises."

The Court of Appeals said: "The owner had an interest in its continued status as property capable of being used and occupied." Perhaps the market value of that interest may be ascertainable by proof in the absence of agreement, but it clearly does not consist of profits plus fixed charges.

FREEDMAN, P. J., and GREENBAUM, J., concur.

Judgment and order reversed, new trial ordered, with costs to appellant to abide event.

HERMAN ANHALT, Appellant, *v.* CHARLES I. LIGHTSTONE, Respondent.

APPEAL by the plaintiff from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, second district, borough of Manhattan.

Morris Meyers, for appellant.

Goldsmith & Rosenthal, for respondent.

FREEDMAN, P. J. This action is brought by the plaintiff for the recovery of the rent of certain premises for the months of May, 1901, to December, inclusive.

The complaint alleges that an oral agreement was made about December 12, 1900, between Morris and Julius A. Bernstein, plaintiff's assignors, with the defendant, whereby the defendant leased said premises for one year from January 1, 1901, to January 1, 1902, at the rate of thirty-one dollars and twenty-five cents per month; that defendant paid the rent for January, February and March, 1901; that a suit was tried before Mr. Justice Penfield for the rent of the month of April, 1901, on November 14, 1901, and in which there was a judgment rendered for the plaintiffs, the assignors of the plaintiff in this action, and that in said

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action and judgment it was adjudged that there was a yearly hiring by the defendant and that there had been no surrender and acceptance of the premises as pleaded by the defendant.

The theory of the plaintiff herein was that the judgment rendered in the action before Mr. Justice Penfield was *res adjudicata* in the present action.

It appears that in April, 1901, plaintiff's assignors brought an action to recover the rent for that month, alleging a written lease for the term of one year, the defendant claiming a leasing from month to month only, and that the defendant recovered a judgment which was subsequently reversed by the Appellate Term (36 Misc. Rep. 193), and a new trial ordered. The Appellate Term then held, in substance, that the testimony of the defendant, which, for the purposes of the appeal, was taken as true, brought the case within the statute which provides that "an agreement for the occupation of real property in the city of New York which shall not particularly specify the duration of the occupancy shall be deemed to continue until the first day of May after the possession commences," etc., and that "it was fair to assume that the hiring was intended for more than one or two months."

It was not there determined as a matter of law as contended for by the respondent herein, that the defendant's hiring was "an indefinite hiring." It is claimed by the plaintiff herein that upon the new trial before Mr. Justice Penfield, held as before stated on November 14, 1901, the plaintiffs amended their complaint so as to set up an oral leasing for one year, from January 1, 1901, to January 1, 1902, and the defendant amended his answer, setting up among other things a "general denial, surrender and acceptance, and an indefinite hiring," and upon these issues the parties went to trial, and the plaintiff had a judgment as aforesaid.

If it is true as set up in the complaint herein, that the material questions involved in this action, were the same as in the former action between the same parties or their privies, then the judgment in such former action would be conclusive in the case at bar.

The learned justice, upon the trial in the present action, excluded all testimony offered by the plaintiff herein, relative to the trial and determination of the issues in the former action. The grounds for such rejection of the offered testimony are stated in

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the opinion handed down by him and attached to the record to be as follows:

"Under the attempted defense of a hiring for an indefinite term no issue was presented, because under the statute such a hiring extended the term to May 1st. That the parties mistook the effect of the pleadings and gave evidence as to whether the hiring was for a definite or indefinite term did not make the question an issue in the case and the decision that the plaintiffs were entitled to recover the rent for April did not involve any determination as to the hiring in that respect."

In this the learned justice was in error. By the general denial interposed by the defendant to the complaint of the plaintiffs he put in issue the character of the term; that is, the plaintiff claimed the term was for one year, this the defendant denied; that question was, therefore, in issue. While it may be true that under the defendant's plea in his answer of "an indefinite hiring" he thereby made himself liable in any event for the April rent; nevertheless there was the controverted allegation of the plaintiff, that the April rent was due under a yearly lease, and not merely because of an indefinite hiring, and therefore there was an issue set forth in the pleadings as to whether the defendant was liable because he was a tenant under a lease for one year, or only as a tenant for an indefinite term, and if that issue was determined in favor of the plaintiff in the former action it would be conclusive upon the defendant in the present action. It was error, therefore, for the trial judge to exclude the judgment in the former action. The plaintiff in the case at bar also offered to prove by Mr. Justice Penfield, the justice before whom the former action was tried, and who rendered judgment therein, what the facts litigated in that action were, and his findings thereon. This offer was refused by the court upon the ground that it was entirely immaterial.

Evidence as to what the issues and what was actually decided in the prior action was admissible. Doty v. Brown, 4 N. Y. 71. But such evidence must be consistent with the record. Lorillard v. Clyde, 122 N. Y. 41.

The judgment must be reversed.

Clarke and Greenbaum, JJ., concur.

Judgment reversed, new trial ordered, with costs to appellant to abide event.

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CHARLES S. CHILDS, Appellant, *v.* HENRY T. SKILLIN, Respondent.

APPEAL by the plaintiff (a landlord) from a judgment of the Municipal Court, tenth district, borough of Manhattan, dismissing his petition in a dispossess proceeding.

L. W. Emerson, for appellant.

Austin & McLanahan, for respondent.

FREEDMAN, P. J. The parties in this action met for trial on May 12, 1902, and the following was then stipulated to be the facts in the case:

"I. That on the 1st day of August, 1901, Carrie I. Rowell was the owner of the premises No. 302 West Seventy-seventh street, New York city, N. Y.

"II. That on the said 1st day of August, 1901, H. C. Rowell, the husband of said Carrie I. Rowell, entered into an agreement which is submitted herewith, with Henry T. Skillin, the above-named defendant. [The instrument referred to is marked Exhibit No. 1.]

"III. That said Henry T. Skillin, the defendant, under the terms of said agreement paid to the said Carrie I. Rowell, through the said H. C. Rowell, the sum of $300 on the 1st day of August, 1901, and entered into possession of said premises.

"IV. That the said Henry T. Skillin paid to the said Carrie I. Rowell, through the said H. C. Rowell, under the terms of said agreement the further sum of $200 on or about the 1st day of October, 1901.

"V. That on the 14th day of November, 1901, said Carrie I. Rowell duly conveyed the said premises to Samuel S. Childs, the above-named plaintiff; that said Samuel S. Childs is now the owner thereof.

"VI. That no further sum or sums were paid by the said Henry T. Skillin under the terms of the said agreement, and Henry T. Skillin is still in possession of the said premises.

"VII. That the said Henry T. Skillin has not received the amount paid by him, as aforesaid, under the terms of the said agreement, namely, the sum of $500, from the said Carrie I.

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Rowell or H. C. Rowell, or from the above plaintiff, or from any one whatsoever, and that the same has been demanded by the said Henry T. Skillin from each of the said parties.

"VIII. That the above-named parties gave notice to the said Henry T. Skillin to vacate the premises more than thirty days before the 1st day of May, 1902.

"IX. That the said Henry T. Skillin was in possession of the said premises at the time of the sale of the same to the plaintiff, as stated in the fifth paragraph herein."

Subsequently the stipulation, so far as related to the written agreement between the parties, was withdrawn, and on June 5, 1902, when the trial was had, the sole question litigated was as to whether certain interlineations in the written agreement had been made before or after its execution. The trial judge dismissed the plaintiff's petition and it must, for the purposes of determining this appeal, be held, that the agreement with the interlineations was the agreement executed by the parties. That agreement is as follows:

"New York, *Aug.* 1, 1901.

"This is to certify that we, Carrie I. Rowell, and H. C. Rowell, have this day demised and leased unto Henry T. Skillin, a certain house and lot of land situate in the Borough of Manhattan, City of New York, and known as No. 302 W. 77th St. owned by the said Carrie I. Rowell for the term of nine months from August 1st, 1901 to April 30th, 1902, at a rental of $750.00 $300. of which rental is to be paid in advance August 1st, 1901. $200. thereof is to be paid on October 1st 1901 and a remaining $250. is to be paid February 1st, 1902, making a total of $750. aforesaid, and the said Henry T. Skillin, is hereby given the right to sublet said house to such person or persons as he deems fit, and it is hereby expressly agreed by said Carrie I. Rowell, and H. C. Rowell her husband that if said house and lot are sold at any time before May 1st, 1902 then from the date of such sale all further payments of rent by said Henry T. Skillin shall cease and all money which has been paid to said Carrie I. Rowell, and said H. C. Rowell her husband by said Henry T. Skillin as rental aforesaid shall be refunded to him by said Carrie I. Rowell and H. C. Rowell her husband before he, the said H. T. S. shall be required to deliver possession of the said premises and the said Henry T. Skillin shall retain and be the owner of all the rents which he may have collected from said premises from August

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1st, 1901 up to the time of delivery of possession of said premises by him to the purchaser of same, all taxes, water rates, interest money or mortgage now upon said premises are to be paid by said Carrie I. Rowell and H. C. Rowell her husband during the continuance of this lease and said Henry T. Skillin or his attorney are to prepare a formal written lease of these premises embracing the conditions of this present writing and said Carrie I. Rowell and H. C. Rowell her husband, hereby agree to execute and deliver the same to Henry T. Skillin as soon as said written lease is prepared presented to and to them or either of them and as Henry T. Skillin has this day paid to said Carrie I. Rowell acting through her husband H. C. Rowell her husband the sum of $300. on account of the aforesaid rent of the said premises. This paper is a receipt and acknowledgment of same as well as a temporary lease for said premises. It is further agreed to give possession of said premises by Henry T. Skillin upon the receipt of thirty days notice and it is further agreed by the said Carrie I. Rowell and H. C. Rowell her husband to make every effort to extend the time for giving possession to sixty days.

"H. C. Rowell.

"Witnesses J. N. Raymond. Henry T. Skillin."

Under this agreement the tenant claims that, notwithstanding he has peaceably occupied the demised premises for his entire term of nine months provided for in the lease and has failed and refused to pay the third instalment of rent due under the terms of the lease, that he has an absolute legal right to continue in possession of said premises indefinitely, or until the former owner repays him the sum of $500, the two instalments of rent which he had theretofore paid under the lease. And this for the reason that the premises were sold, between the time of the making of the lease, and the time provided therein for its termination. This construction of the agreement is inequitable and unsound in law. It is clear that the parties to the lease contemplated a sale of the demised premises during the term of the lease, otherwise no mention of a sale would have been made therein, and the tenant would have been compelled to pay the full amount of the rent provided for in the lease, and to vacate at the end of his term.

The lease, however, provided for two contingencies, one, a sale of the premises, and the other the rights of the tenant, should a sale occur during the existence of the lease, and the tenant be

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required to surrender possession before the expiration of his term. If, notwithstanding a sale, the tenant would have a right to remain in possession of the premises, there would have been no necessity for a clause in the lease preserving his rights in the event of a sale. The mere fact that such a clause was inserted therein is evidence that the parties contemplated a curtailment of the nine months' term, in the event of a sale, and if the vendee required possession of the premises before the lease expired.

While the lease does not in express terms provide that if such sale shall occur the term shall, *ipso facto,* expire, such is the legal effect. Miller v. Levi, 44 N. Y. 489; Morton v. Weir, 70 id. 247; Cottle v. Sullivan, 8 Misc. Rep. 184.

The last provision of the lease is corroborative of this construction. That clause requires the tenant to surrender possession of the premises "upon receipt of 30 days notice," but the owner "is to make every effort to extend the time for giving possession to 60 days." This clearly refers to the contingency of a sale and not to the giving of notice at the termination of the lease.

What then were the tenant's rights under the lease in the event of a sale during its existence and a desire on the part of the vendee to obtain possession of the premises before its termination? Simply these: Before he could be required to surrender the premises prior to the expiration of his term, a notice of thirty days must be given, and a repayment to him of all sums previously paid by him, and all future payments of rent to cease, or he to have peaceable possession of the premises until the time for which he had rented had expired. The last-mentioned privilege the tenant did have. He continued to occupy the premises until the time for which he had rented them had expired. Thirty days prior thereto he was notified to surrender the premises at the expiration of his term. This he refused to do. In this he is in error. He has had the full use and beneficial enjoyment of the leased premises during the entire term of his lease; he can neither legally nor equitably longer retain them. The judgment must be reversed.

CLARKE and GREENBAUM, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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ROSE LEAHY, as Administratrix, Etc., of NICHOLAS BURNS, Deceased, Appellant, *v.* WILLIAM J. MOONEY, as President of Catholic Benevolent Society, Attached to St. Martin of Tours Church, Belmont, New York City, Respondent.

APPEAL from a judgment of the Municipal Court, second district, borough of The Bronx, in favor of the defendant.

Henry K. Davis, for appellant.

D. S. Voorhees, for respondent.

CLARKE, J. Action brought by the administratrix of Nicholas Burns, deceased, who was at the time of his death, and had been for upward of fifteen years prior thereto, a member of the Catholic Benevolent Society attached to St. Martin of Tours Church, Belmont, New York city, an unincorporated association consisting of more than seven members, of which society the defendant, William J. Mooney, was president, to recover the sum of seventy-five dollars as funeral expenses claimed to be due upon the death of said Burns, under the constitution and by-laws of the society. By article 1 of the constitution it is provided: "The object of this society is to afford mutual benefit and assistance in cases of sickness or accident, and to give a decent burial to any deceased member, and furthermore to show in our every word and act Friendship, Unity, and True Christian Charity. Friendship in assisting each other to the best of our power; Unity in uniting together for mutual support in sickness and distress: True Christian Charity by doing to each other as we would wish they should do unto us." Article 4 of the by-laws is entitled "Benefits;" section 3 thereof provides: "In case of death of a member the sum of seventy-five dollars shall be appropriated for funeral expenses. In the absence of competent relatives or friends, the President shall take charge of the funeral and keep an account of the expenses."

Article 5 is entitled, Rights of Members, and Duties. Section 3 thereof provides: "Any member failing to pay his dues, fines, taxes or other assessments or any other indebtedness for the space of three months, will not be entitled to any benefits for three months after paying up such arrears." Other provisions provide for monthly dues and fines for nonattendance at the

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quarterly meetings of the society and for not performing religious duties at Easter and Christmas. At the time of his death Nicholas Burns had paid his regular monthly dues, so that there was no period in which his arrears for dues had extended over more than two months. But defendant claims that for nonattendance at a quarterly meeting and at the Easter and Christmas celebrations he had incurred fines which had not been paid and which had been due and unpaid for more than the period provided in the by-laws, and hence the right to receive the funeral benefit had been forfeited.

It was in evidence that Burns had been seriously ill for a great part of the time for two years, and that on the days of the quarterly meeting and Christmas and Easter he had been too sick to leave the house. It was in evidence also that the society was in the habit of remitting fines when sickness had prevented attendance. Nevertheless the society insists that by the failure of Burns to pay two dollars for fines alleged to be due for more than three months he had forfeited the right acquired during fifteen years' membership of the society to have seventy-five dollars appropriated from its funds to help give him decent burial. The Appellate Division held in Hess v. Johnson, 41 App. Div. 465, "That constitution is the contract between the parties, and if its provisions are not illegal, immoral or contrary to public policy, it must be upheld whether reasonable or not, for parties have the right to enter into unreasonable or unwise contracts so long as such contracts are not illegal and are fairly made. This is the distinction between the case of a voluntary association and that of a corporation." So that if these fines had in accordance with the provisions of the by-laws been legally imposed the dismissal of the complaint below was right. Section 2 of article 6 of the by-laws provides, "All the members are required to go to their duties in a body twice a year, viz.: at Easter and Christmas. For not complying with this order a fine of one dollar will be imposed for each offense." This language necessarily implies affirmative action either by the society at large at a meeting thereof or perhaps by the managing committee whose duties include the following: "They shall investigate all delinquent cases and complaints and transact all important business connected with the society. They can remit fines." By-laws, art. 8, § 5. There is no evidence that these fines were ever "imposed" by the society or its managing committee. The mere entry of the amount thereof in the books of the financial secretary is not

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enough. Again section 4 of article 4 of the constitution provides: "Financial Secretary's Duty. He shall keep a correct account of all receipts of the Society and notify members of their arrears. He shall collect all initiation fees, dues, fines and assessments, and pay the same over to the Treasurer, taking his receipt therefor." Not only is the case barren of evidence that these fines were ever properly imposed upon Burns, but it nowhere appears that he was ever notified by the financial secretary or any one else that they had been imposed, and while it does appear that two dollars and fifty cents for dues was collected of his wife shortly before his death, it does not appear that he was told that any sum was due for fines imposed for nonattendance at meetings or nonperformance of religious duties. If such notification had been given, an opportunity would have been afforded to have applied for remission on the established ground of physical disability, and said application, in accordance with the proved custom of the society, would have been granted. The society defends upon the strict letter of the constitution and by-laws and cannot be heard to complain if the same rigor is applied to prevent a forfeiture. The defense must fail because it does not appear that the fine was properly imposed and that notification thereof was ever — as provided in the by-laws — given to decedent.

FREEDMAN, P. J., and GREENBAUM, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

LAURE L. MCWHIRTER, Appellant, *v.* JAMES W. LONGSTREET, Respondent.

APPEAL from a judgment of the Municipal Court, tenth district, in favor of the defendant after trial by the court without a jury.

James S. Thompson, for appellant.

J. G. Lazarus, for respondent.

CLARKE, J. Action upon a promissory note; defense, usury. Defendant being in urgent need of money, made a note payable to

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the order of one Ferris, payable in thirty days, for $250, and asked him to procure money on it, making an agreement with him that if he could succeed in selling same Ferris should receive seventy-five dollars as bonus or commission. A receipt given by Ferris to defendant is in evidence, which, after describing the note, proceeds: "The above mentioned note is received on sale. If sold $175 to be returned for same." The note was a collateral stock note. After some days Ferris told defendant that he had not sold the note, and defendant said that he was very hard up for money and that any amount over $100 that Ferris might derive from the sale of the note he should retain and give defendant $100.

Thereafter Ferris sold the said note to plaintiff, who paid to Ferris the face value thereof, $250, of which Ferris paid to defendant $100, and took his receipt therefor in writing. Thereafter said note not having been paid defendant made a new note to plaintiff for $253.13/100, payable on demand, and received back his original note. This second note is the one in suit. There can be no doubt that as between the original parties the defense must have prevailed. Nor is there any doubt that the amount of bonus retained by Ferris was unconscionable. But there is no proof in the case that plaintiff was a party thereto, had knowledge thereof, or profited thereby. She testified positively that she paid $250 for the note; that she had no knowledge whatever of the arrangement between Ferris and defendant; that she had received no part of the bonus, and that she had not been paid back any part of the original amount paid by him. Ferris also testified positively that he had received the $250 from plaintiff and had not informed her of his interest in the transaction, and had not paid her any portion of his bonus. Defendant gave no evidence in contradiction, but seeks by suggestion and surmise from the fact that Ferris had boarded with plaintiff, who kept a large boarding-house on Fifth avenue, with some thirty rooms; that from that relation it is to be inferred that plaintiff was cognizant of and a party to the usurious agreement. But this will not do. The rule laid down by Judge Earl in Stillman v. Northrup, 109 N. Y. 477, and followed and applied many times, is as follows: "To render the note void for usury, it was not sufficient for the defendants merely to show that plaintiff's agent took and exacted the fifty dollars as a condition of the loan. But it was incumbent upon them to show that he took the fifty dollars with the knowledge and assent of the plaintiff, so that she, at least by acquiescence, became a

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party to the usurious exaction. And the burden of establishing such knowledge and acquiescence on the part of plaintiff rested upon the defendants, and they were bound to sustain that burden by satisfactory evidence. The defense of usury, involving crime and forfeiture, cannot be established by mere surmise and conjecture, or by inferences entirely uncertain. If, upon the whole case, the evidence is just as consistent with the absence as with the presence of usury, then the party alleging usury has failed."

FREEDMAN, P. J., and GREENBAUM, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

THE J. L. MOTT IRON WORKS, Appellant, *v.* PHILIP H. REILLY, Respondent.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, entered in favor of the defendant upon the dismissal of the complaint.

Hugo S. Mack, for appellant.

Howe & Hummel, for respondent.

GREENBAUM, J. This action was brought for the conversion of ten bathtubs placed in the apartments of the building No. 105 West One Hundred and Thirty-eight street, New York city.

The undisputed facts are that the plaintiff delivered "at the building or buildings situate on the north side of One Hundred and Thirty-eighth street, 150 feet west of Lenox avenue," owned by one Schuyler, seventy bathtubs to One Michael Hughes, a plumber, under a written agreement, dated May 11, 1901, that he would pay therefor the sum of $1,200 "within sixty days after delivery," and it was by this agreement "further understood and agreed that all the articles aforementioned are not to be considered as sold or the title thereto to be passed until the sum or sums above stated are fully paid in cash; that upon any breach by the undersigned Michael Hughes of the conditions for the payment of the purchase price or indebtedness or any part thereof above mentioned The J. L. Mott Iron Works or its agents shall have the right, power and authority to enter any place or places

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where such articles are or may be placed, and take and carry away the same, and thereupon the payment that may have been made by the undersigned Michael Hughes thereon shall be deemed to have been paid for the use of said articles up to the time of the removal and for the expense of removing the same."

The plumber Hughes had a contract with one Schuyler, the owner of the premises on One Hundred and Thirty-eighth street, near Lenox avenue, for the plumbing work, including the furnishing and fitting up of the bathtubs in suit, in the houses that were then being erected by Schuyler. The tubs were delivered to Hughes by the plaintiff, under the contract above set forth, in May, 1901, and they were put in the building at about the same time; the contract was filed in the register's office of the county of New York on the 20th day of September, 1901; on March 6, 1902, the premises were sold by a referee in a suit for the foreclosure of a mortgage to one Minnie Rose, from whom the defendant took title.

There was no proof that when the defendant became vested with the title of the premises and took possession he had any knowledge or notice of plaintiff's claim to the ownership of the bathtubs, and such knowledge was not acquired until the commencement of this action. Nor was there any proof that the plaintiff or its agents attempted "to enter the place" where the bathtubs were for the purpose of taking or carrying them away, nor was any demand whatever made upon the defendant for the delivery up of the property.

The Lien Law (Laws of 1897, chap. 418, § 112) which is here invoked by the appellant is applicable to the "conditional sale of goods and chattels, accompanied by immediate delivery and *continued possession* of the thing contracted to be sold." The "continuous possession" required by the statute obviously refers to a case where the continued possession of the chattel is intended to remain with the vendee. In the case at bar the contract contemplates that the tubs are not to be in the continued possession of the vendee, but in the owner of the premises wherein the tubs were to be placed. It is thus a matter of grave doubt whether the plaintiff in the case here presented comes within the operation of the Lien Law.

Assuming, however, merely for argument's sake, that the Lien Law is here available to him, and that the defendant was chargeable with notice of the plaintiff's title to the tubs, by reason of the filing of the contract in the register's office, it is apparent that

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the tubs were lawfully in the defendant's premises, and therefore lawfully in his possession when the action was commenced, inasmuch as it did not appear that the plaintiff ever attempted to exercise the authority given to him to remove the tubs.

A demand in such a case is an undoubted prerequisite to a recovery in conversion.

Schechter v. Watson, 35 Misc. Rep. 43, is easily distinguishable from this case, as it appeared in that case that the defendant took manual possession of plaintiff's property, without any acquiescence on the part of plaintiff, express or implied, and in disregard of the plaintiff's rights. In such a case there never was a lawful possession, and a demand was held unnecessary.

It also appears in this case that the only proof of value was the price which Hughes agreed to pay plaintiff for the tubs. This is not evidence of value, and there was, therefore, no proof of value.

The judgment is affirmed, with costs.

FREEDMAN, P. J., and CLARKE, J., concur.

Judgment affirmed, with costs.

CITY COURT OF NEW YORK, GENERAL TERM, NOVEMBER, 1902.

THE VERISCOPE COMPANY, Appellant, *v.* WILLIAM A. BRADY, Respondent.

APPEAL by plaintiff from an order retaxing costs on a demurrer.

Nathan, Leventritt & Perham, for appellant.

Dittenhoeffer, Gerber & James, for respondent.

CONLAN, J. The demurrer herein was to a part of the answer, and was duly sustained with costs, to be taxed by the clerk. When these costs came on for taxation the clerk, on objection of defendant, taxed fifteen dollars costs after notice of trial. From an order disallowing said item this appeal is taken.

I am of opinion that the order is wrong and should be reversed. There are authorities to the effect that the costs in this court, upon the determination of an issue of law, cannot exceed the sum of twenty dollars, but I consider them disproved by the recent case of Garrett v. Wood, 23 Misc. Rep. 7. It was stated there by Mr.

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Justice Chester of the Supreme Court, third department, that: "As the Code of Civil Procedure required the issue of law to be disposed of before the trial of the issue of fact, and as the issue of law was required to be brought to trial upon notice, I think it is proper that the item of costs after notice and before trial should be allowed." This decision was unanimously affirmed on appeal (61 App. Div. 294), and is binding on this court.

It follows, therefore, that the order appealed from should be reversed, with costs, and the motion for taxation denied, with costs.

McCarthy and Seabury, JJ., concur.

Order reversed, with costs, and motion denied, with costs.

Thomas Vanevery, Respondent, *v.* Thomas A. Ennis et al., Appellants.

Appeal from a judgment entered upon verdict, and from an order denying defendants' motion for a new trial upon the minutes, etc.

Chas. Henry Phelps, for appellants.

Thomas Sproull and Gormly J. Sproull, for respondent.

Conlan, J. The appellants' plea and argument are mostly addressed to the grace of the court, and not the judgment that would rigidly enforce the law. The rather lengthy record of an exhaustive trial presents for the most part an attempt on the part of the brokers to excuse the shortcoming of themselves or their office force, or the exchange, upon whose floor they daily transact business and earn commissions. In other words, they say that, because of inherent defects of a system, of which their own daily activities constitute a portion, irrespective of the true merits of the plaintiff's claim, they should be let off from the performance of obligations which, had there been no unusual disturbance in the affairs of the exchange, or a day of panic, they would have found nothing to defend against. This appears to have been the view which the jury took of the matter upon the facts proven upon the trial.

Careful perusal of the record of proceedings before the jury shows that in some instances and strictly speaking the court was

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at fault in some of its rulings; but where such fault occurred with regard to unimportant, irrelevant, or immaterial matter, its commission should and will not present sufficient ground or reason for overturning a result below, which, upon the whole case, shows proper, unprejudiced, and dispassionate consideration by the jury. It appears that substantial justice was done between the parties upon competent and adequate proof.

Much might be said and written about the dangers incident to sudden or far-reaching panics upon the stock exchange of this or any other great city; but it is enough, in passing, to remark that persons dealing with each other in the manner and under the condition of the parties to this action, contract with each other, assume obligations, and must accept results with, presumably, full knowledge of the surroundings and possible conditions in performance of their agreements. In this case the findings by the jury and rulings by the court present a result which should remain of record.

The judgment and order appealed from should be affirmed, with costs.

Seabury, J. (concurring). The complaint sets forth two causes of action. The first cause of action for $775 is predicated upon the alleged negligence of the defendants as stockbrokers, in failing to purchase certain stocks ordered by the plaintiff. The second cause of action alleged is for cash deposited with the defendants as "margins," amounting to $646.32. It appears from the testimony that on May 9, 1901, between the hours of eleven and twelve in the forenoon, the plaintiff gave the defendants an order, which they accepted, to buy for him forty shares of the stock of the Missouri Pacific Railway Company, at the market price. The order was an "unlimited" one and imposed no restriction as to price upon the broker. When the order to buy was given to the defendants Missouri Pacific stock was selling at 79.

The circumstances existing on the day in question, on the floor of the Consolidated Stock Exchange, were abnormal. It was a day of panic, and much confusion existed on that account in the offices of brokers and on the floor of the stock exchange.

The first question to be determined on this appeal is, what duty were the defendants under toward the plaintiff when the order to buy was placed with them? It was not an absolute duty which the defendants were bound under all circumstances to perform. The duty which the law required of the defendants in reference to

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executing the orders of their customers was commensurate merely with existing opportunities for its performance. The law does not require them to do that which is impossible, or to do that which can only be done as a result of extraordinary diligence or effort. The broker is required to exercise due and reasonable diligence under the existing circumstances. Measured by this standard, I think the jury were justified in finding the defendants guilty of negligence. The evidence showed that over 15,000 shares of Missouri Pacific stock were sold on the floor of the Consolidated Exchange on the morning in question. Notwithstanding the prevailing condition of panic these sales were actually made. Although the stock was selling at 79 when the order was given to the brokers, many hundred shares of this stock were sold at prices ranging between 70 and 79. It should, however, be recalled that the order given to the defendants was an unlimited one, and that they were not limited to purchasing at 79 or less. In view of the fact that thousands of shares of this stock were sold on this exchange that morning, that the broker was not limited as to the price which he could pay for the stock, we think that the finding of the jury, that the defendants were negligent in not purchasing forty shares of this stock for the plaintiff was entirely justified.

I think the evidence in support of the second cause of action was sufficient to sustain the finding of the jury. For the reasons above stated, I concur in the result reached in the opinion of Mr. Justice Conlan, that this judgment should be affirmed.

The judgment is affirmed, with costs.

Judgment affirmed, with costs.

AGNES BONDY, Respondent, *v.* THOMAS C. PLATT, as President of the United States Express Co., Appellant.

APPEAL by defendant from a judgment entered in favor of plaintiff, on the verdict of a jury, and from an order denying defendant's motion for a new trial.

Boardman, Platt & Soley, for appellant.

William Bondy, for respondent.

DELEHANTY, J. I am of the opinion that this judgment is right and should be affirmed. The defendant herein, notwithstanding its contention to the contrary, is not protected by, nor can it legally

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claim, that the terms of the receipt delivered plaintiff for the trunk in question, inured to its benefit as a connecting carrier. The case of White v. Weir, 33 App. Div. 145, relied upon by it as an authority for this pretension, was decided upon an entirely different state of facts from the case at bar and does not conflict in any manner with the long line of decisions, ending with the comparatively recent and well-considered one of Robinson v. New York & T. SS. Co., 63 App. Div. 211, which held in effect that where, as here, the first carrier only contracts for itself, namely, to carry to and deliver to a connecting carrier, the latter is not entitled to any exemptions by virtue of that contract; and that is so, even though the shipper knew that the matter expressed, in order to reach its destination, would have to go over other lines. In the case at bar the shipment was with the Century Express, and the receipt given therefor, while containing a number of exemptions, fails to reserve any but to itself. It is conceded that the Century Express delivered the trunk in question to the defendant, and the uncontradicted proof is that such delivery was in the same condition as the Century Company received it. Thus, under the terms of the receipt in question, the Century Company fully discharged its obligation to plaintiff. As no provisions are found therein which in any way inure to the benefit of defendant company, it is difficult to understand how it can claim exemption from liability. It saw fit to receive plaintiff's trunk without a contract, and it was in duty bound to deliver to her the same in the condition received. It did not do so, and therefore liability attaches.

The measure of damages, in my opinion, was properly applied by the jury, and the verdict rendered conservative under the proof. Failing to find reversible error in any of the exceptions taken, I am of the opinion that the judgment and order appealed from should be affirmed, with costs.

SEABURY, J., concurs.

Judgment and order affirmed, with costs.

MORRIS ZION, Appellant, *v.* LOUIS DE JONGE, JR., CHARLES F. ZENTGRAF, and the UNITED STATES FIDELITY AND GUARANTEE CO., Respondents.

APPEAL by plaintiff from a judgment in favor of defendants, entered on a direction of the court at Trial Term, dismissing the complaint herein.

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Phillips & Rippe, for appellant.

Lamb & Voss, for De Jonge and Zentgraf.

Leonidas Dennis, for the United States Fidelity & Guarantee Co.

DELEHANTY, J. The action is in conversion, and in order to maintain at the trial the issues raised by the pleadings, plaintiff proved his ownership of the goods in question, that the sheriff levied thereon, and that thereafter he (plaintiff) never saw or had further to do with same. He sought to prove by parol the removal and sale by the sheriff of the levied goods, which testimony was excluded as secondary evidence. At the close of plaintiff's case, on motion of defendants the complaint was dismissed for failure to prove a cause of action. I think this was error. Conversion has been defined to be an authorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition, or the exclusion of the owner's rights. Black L. Dict.; Laverty v. Snethen, 68 N. Y. 524.

It is not incumbent on plaintiff in an action of this nature to make out more than a *prima facie* case in order to put the defendant to his proof. When, as here, he has shown ownership, and the levy by the sheriff for sale, he has done all that the law requires, for the act of the sheriff was such an exercise of dominion over the goods in question as would sustain an action for either conversion or replevin, although there was no actual removal of the goods. Alvord v. Haynes, 13 Hun, 28; Knapp v. Smith, 27 N. Y. 277; Smith v. Smalley, 19 App. Div. 521.

It follows, therefore, that the complaint herein was improperly dismissed, and for the error thus committed the judgment appealed from must be reversed and a new trial granted, with costs to appellant to abide the event.

McCARTHY, J, concurs.

Judgment reversed and new trial granted, with costs to appellant to abide event.

THE GARDEN CITY COMPANY, Respondent, *v.* FRANCIS J. SCHNUGG, Appellant.

APPEAL from a judgment entered upon the verdict of a jury in favor of the plaintiff.

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Albert J. Wise, for appellant.

Russell & Holmes (Clarence T. Block and James S. d'Arcy, of counsel), for respondent.

SEABURY, J. This action is brought to recover a sum of money alleged to be due the plaintiff under an order from one Blumenthal upon the defendant.

Blumenthal had entered into a contract with the defendant, under the terms of which the defendant agreed to advance to Blumenthal, or her order, certain sums of money aggregating $50,000, as the work upon certain buildings on One Hundred and Twelfth street in the city of New York progressed. The plaintiff having furnished the brick for said buildings Blumenthal gave to it an order upon the defendant, directing him to pay the plaintiff the sum of $815 out of the money which the defendant had agreed to advance to Blumenthal, or her order. The order given was as follows:

"NEW YORK, *August* 2/98.

"Mr. FRANCIS J. SCHNUGG,

"DEAR SIR:—Please pay to the order of Garden City Company, the sum of Eight hundred and fifteen dollars, and deduct said amount out of the following payments:

1/3 out of 6th payment.
1/3 " " 7th "
1/3 " " 8th "

as per building contract between you and myself for house 112th Street near 5th Avenue.

"BABETTE BLUMENTHAL,
"by George Blumenthal,
"Attorney."

This order was presented by the plaintiff upon the same day that it was given and accepted by the defendant. The order was payable in instalments of $271.66, and the first instalment was paid. This action is brought to recover the remaining sum of $543.33. The contract between Blumenthal and the defendant provided for the payment of the sum of $50,000 in ten instalments, dependent upon the progress of the work upon the building. This contract contained the following clause: "And it is further agreed by and between the parties hereto that if at any time when payment as above specified shall become due and be

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demanded, there shall be a lien or incumbrance upon or affecting the title of the said premises by reason of any mortgage subsequent to that aforesaid mechanic's lien, judgments, taxes or assessments, then the payment so due as aforesaid, and the payments thereafter to be made, shall not be advanced until such lien or incumbrance is satisfied, paid or discharged of record."

Upon the trial the defendant disputed that the buildings had been substantially completed. This question was properly submitted to the jury, and their verdict must be held to have settled the question in favor of the plaintiff.

The defendant also contended upon the trial that as certain mechanics' liens were filed against the property during the progress of the work, that the plaintiff under the clause of the contract quoted above, could not recover.

A lien was filed against the property by one Darmstadt prior to the acceptance of the order from Blumenthal by the defendant. Evidence was received to show that the defendant retained from Blumenthal a sufficient sum to pay this lien. This was contested upon the trial, and the question was fairly submitted by the trial justice to the jury, and their verdict determined this question in favor of the plaintiff.

Several other liens were filed against the property subsequent to the acceptance by the defendant of the order which Blumenthal gave the plaintiff. The trial justice held that as the order of Blumenthal amounted to an assignment of the funds in the defendant's hands, it could not be affected by subsequently filed liens. In so deciding we think no error was committed. There was nothing in the contract with the defendant which prevented Blumenthal from assigning to the plaintiff in payment of its debt against her moneys due, or to become due under the contract. This assignment having been made before any lien was filed, the plaintiff acquired a preference over subsequent lienors. Bates v. Salt Springs Nat. Bank, 157 N. Y. 322, 327; Brill v. Tuttle, 81 id. 454; Lauer v. Dunn, 115 id. 405; McCorkle v. Herrman, 117 id. 297; Stevens v. Ogden, 130 id. 182; Beardsley v. Cook, 143 id. 143.

The judgment is affirmed, with costs.

McCarthy, J., concurs.

Judgment affirmed, with costs.

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SABINA MITTLER, Respondent, *v.* PETER HERTER, Appellant.

APPEAL from judgment entered upon the verdict of a jury in favor of the plaintiff and from an order denying a motion for a new trial.

John F. Coffin, for appellant.

Max Steinert, for respondent.

SEABURY, J. This action was brought to recover the sum of $250, which the plaintiff deposited with the defendant as security for a lease which the defendant made to the plaintiff of certain premises described in the complaint, and which sum it was agreed should be returned to the plaintiff on the fulfillment of the contract by the plaintiff, or on the failure to fulfill on the part of the defendant. According to the contention of the plaintiff the size of the store which the defendant agreed to lease to the plaintiff was to be 25 feet wide and 132 feet deep. The defendant admitted the making of the lease but denied that it was agreed that the store was to be of the dimensions alleged by the plaintiff, and alleged performance upon his part and the failure of the plaintiff to perform the agreement. The written lease entered into by the parties provided that the plaintiff agreed to hire and the defendant agreed to let "the northerly half store of Nos. 7 and 8 Chatham Square" to be used as a clothing store for the term of five years. At the time of the execution of the lease the building was not completed, and the lease provided that the plaintiff's possession of the store was to commence five days after notice of the completion of the building. The building was subsequently completed and notice in conformity to that required by the terms of the lease was duly given. The plaintiff did not take possession of the premises and demanded the return of the $250 deposited as security. Upon the trial of the action the plaintiff was permitted, over the objection and exception of the defendant, to introduce in evidence a letter written before the execution of the lease, and to prove conversations between the parties for the purpose of showing that the premises demised were to be 25 feet wide and 132 feet deep, and that the store offered by the defendant was only 19 feet wide and 132 feet deep. The correctness of the rulings of the court in admitting the letters and proof of the conversations in evidence are chal-

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lenged by this appeal. The appellant invokes the general rule that parol evidence in inadmissible to vary or contradict the terms of a written instrument and insists that the terms of the lease in question were definité and certain and clearly defined the dimensions of the store. The rule which the appellant invokes is not absolute, and there are exceptions to it. Where the description of the premises demised is obscure, vague or ambiguous, it has been held that the declaration and acts of the parties may be proven to determine the intent of the parties. In Harris v. Oakley, 130 N. Y. 1, Haight, J., said that where "in the description of premises in a deed, courses, distances and monuments are given, the premises must be located according to the deed, and all parol evidence of the declarations and acts of the parties of an intended different location is inadmissble as contradicting or varying the deed. But there is another rule to which we must call attention, and that is, that where the description contained in the deed is so vague, obscure or conflicting as to leave the intent of the parties uncertain, the declarations and acts of the parties may be shown by parol."

In the case at bar, the description of the premises demised was clearly ambiguous and vague so that a resort to parol evidence was necessary and proper. The description used in this case, "the northerly half store" certainly did not sufficiently designate the exact boundaries of the premises demised. Parol evidence therefore "was admissible not to contradict or vary the lease, but to identify the part of the store demised, and show the appellant's intention." Freund v. Kearney, 23 Misc. Rep. 685. In Freund v. Kearney, *supra,* the description contained in the lease was that "the westerly half" of the store in question was leased, and it was held that oral testimony to explain the ambiguous description was admissible. The case also reviews many other decisions which demonstrate beyond question the correctness of the admission of such evidence in the present case.

The judgment and order appealed from must be affirmed, with costs.

CONLAN and MCCARTHY, JJ., concur.

Judgment and order affirmed, with costs.

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CITY COURT OF NEW YORK, GENERAL TERM, JANUARY, 1903.

OSCAR S. BAILEY, Respondent, *v.* GEORGE J. KRAUS, Appellant.

APPEAL from a judgment entered upon an order, directing a verdict in favor of plaintiff.

Charles L. Hoffman (Henry A. Friedman, of counsel), for appellant.

Warren, Warren & O'Beirne (L. E. Warren, of counsel), for respondent.

MCCARTHY, J. This action was brought to recover the balance due for the board and care of the defendant's horses. Upon the trial an attempt was made by the defendant to prove his discharge in bankruptcy subsequent to the contracting of the debt, to recover which this action was brought. The trial justice excluded proof of the defendant's discharge in bankruptcy, to which exclusion the defendant excepted. The defense which the defendant attempted, being in confession and avoidance of the cause of action, must be pleaded to authorize evidence thereof to be given upon the trial. McKyring v. Bull, 16 N. Y. 297; Revere Copper Co. v. Dimock, 90 id. 33. The allegations under which the defendant attempted to prove his discharge were merely to the effect that on January 25, 1899, he duly filed his petition in bankruptcy under the act of Congress approved July 1, 1898, and that subsequently he surrendered his property and was adjudged a bankrupt, and was duly and legally discharged "from all his debts and liabilities of every kind, nature and description, provable under the laws hereinbefore referred to." The answer of the defendant does not show in which one of the United States District Courts the defendant filed his petition, or allege facts showing that the court in which the proceedings were taken had jurisdiction of the parties or subject-matter. In failing to contain these allegations the answer was insufficient to admit proof of the defendant's discharge in bankruptcy. Cromwell v. Burr, 59 How. Pr. 93; Morrison v. Woolson, 29 N. H. 510; Sackett v. Andross, 5 Hill, 327; McCormick v. Pickering, 4 N. Y. 276; Baylies Code Pl. 252.

The only other question calling for consideration upon this

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appeal is presented by the refusal of the trial justice to permit the defendant to amend the answer. The plaintiff was informed by the original answer that the defendant relied upon his discharge in bankruptcy as a defense. The application to amend the answer so as to allow proof of discharge from the claim in suit, while late, was nevertheless addressed to the sound discretion of the court, and ought to have been allowed on such terms as appeared fair and reasonable. No claim of surprise was made at the time the amendment was asked for. The defense was statutory and went to the whole cause of action. To the refusal of the court to allow the amendment the defendant duly excepted.

We are of the opinion that the refusal deprived the defendant of a substantial right and was error. For these reasons we think the judgment should be reversed, without costs, and a new trial ordered, with leave to appellant to apply at Special Term to amend his answer.

CONLAN, J., concurs.

SEABURY, J. (dissenting). I dissent. The answer was clearly insufficient to admit proof of the defendant's discharge in bankruptcy, as appears from the authorities referred to in the opinion of Mr. Justice McCarthy. I think under the circumstances that the ruling of the trial justice was correct in refusing to permit the amendment which the defendant asked leave to make. The proposed amendment would not, under the authorities cited in the prevailing opinion, be sufficient to entitle him to prove his discharge. This case has been pending since January, 1900, and in June, 1901, was before the General Term of this court, when the defendant was apprised of the defective character of his pleading. Bailey v. Kraus, 35 Misc. Rep. 851.

The laches of the defendant in not applying for leave to amend his answer was a sufficient justification for the refusal to permit the amendment sought upon the second trial of the action. This court cannot presume that there was an abuse of discretion upon the part of the trial court. To justify us in reversing this judgment upon this ground, such an abuse of discretion must affirmatively appear in the record.

The Encyclopedia of Pleading and Practice (vol. 1, p. 522) states the rule which applies in this case, in the following language: "A party who has notice of a defect in his pleading should move to amend without unreasonable delay, otherwise the

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court will be justified in denying him leave to amend on the ground of laches."

The remarks of Van Brunt, P. J., in Butler v. Farley, 17 N. Y. St. Repr. 109, are applicable to this case: "It was not error under the circumstances to refuse the application to amend. The counsel knew before entering upon the trial of the condition of the pleadings, and if he chose to experiment with the other side as to their diligence in discovering the issue presented by the pleadings, after his discovery that they had read the pleadings before going to trial, it was too late to ask for an amendment. Knowing, as the defendant did, the infirmities of his answer, he was bound, if he wanted an amendment, to ask for it before going into the trial."

The judgment should be affirmed, with costs.

Judgment reversed, without costs, and new trial ordered, with leave to appellant to apply at Special Term to amend his answer.

HENRY SIMMON, Respondent, *v.* LYMAN G. BLOOMINGDALE, Appellant.

APPEAL from a judgment entered on a verdict of a jury, in favor of the plaintiff, and from an order denying a motion for a new trial.

Hays & Hershfield (Daniel P. Hays, of counsel), for appellant.

Samuel Strasbourger (Emanuel Eschwege, of counsel), for respondent.

MCCARTHY, J. This is an action to recover damages for false imprisonment. The defendant is the proprietor of a department store doing business under the name of "Bloomingdale Brothers." On June 22, 1901, plaintiff applied at the store of the defendant for a position and was refused employment. After leaving the store he met one Weyl, who was an employee of the defendant. It appears that the defendant had placed certain awnings in the house of a Mrs. Fisher. Some one had subsequently called upon Mrs. Fisher, claiming to represent the defendant, and demanded payment for the work done. Mrs. Fisher paid this person, who, in fact, had no connection with the defendant. On the

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morning of the day that the plaintiff applied for work, one Rosenberg, a salesman in the employ of the defendant, caused the arrest of the plaintiff and Weyl. There was also testimony to the effect that Mr. Schwab, who was the superintendent and general manager of the defendant's business, directed Rosenberg to press the charge against the plaintiff after the arrest had been made, although this was denied by Schwab. Mrs. Fisher failed to identify the plaintiff or Weyl as the person to whom she had paid the money for placing the awnings, and they were both discharged by the city magistrate before whom they had been brought. The jury returned a verdict of $600 in favor of the plaintiff. The defendant contends that Rosenberg, who was merely a salesman in his employ, had no authority, express or implied, to cause the arrest of the plaintiff. Without considering the extent of Rosenberg's authority, we think there can be no doubt that as his act was ratified by Schwab, who was the superintendent and general manager of the defendant's business, that the defendant was liable for it. There was direct testimony as to the ratification by Schwab, and, while it was contradicted by Schwab, the verdict of the jury has settled this question in favor of the plaintiff. We think, therefore, that the defendant was clearly liable for the act of his agent in causing the arrest. Stevens v. O'Neill, 51 App. Div. 364; Dupre v. Childs, 52 id. 306; Warren v. Dennett, 17 Misc. Rep. 86.

We think that the rulings of the court, excluding conversations held between the agents of the defendant, which were not had in the presence of the plaintiff, were correct as not binding upon him. These conversations were attempted to be introduced to show that Rosenberg and Schwab were without authority to make the arrest, but if they were then engaged in their master's business, and acting within the general scope of their employment, even if they departed from the private instructions of the master, the defendant would nevertheless be liable. Rounds v. D., L. & W. R. R. Co., 64 N. Y. 129.

We have carefully examined this record but find no error which would justify a reversal of the judgment entered upon the verdict of the jury.

The judgment is affirmed, with costs.

DELEHANTY and SEABURY, JJ., concur.

Judgment affirmed, with costs.

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INDEX.

ACCOUNTING.
See **Attorneys; Executors and Administrators; Surrogate's Court.**

ACCOUNT STATED.
When established — Implied promise to pay the balance due.—Where a creditor states, in the presence of his debtor, that there has been a settlement of their differences and that the debtor has agreed to give him an assignment of a claim, which the debtor holds against a third party, for $1,670, and the debtor says nothing, an account stated exists between the parties entitling the creditor, *prima facie*, to recover $1,670. The debtor need not promise to pay this amount as the law implies such a promise from the admission of a balance due. Forbes v. Wheeler, 538.

ACTIONS.
1. *Equity — To determine conflicting claims to a fund which the debtor is ready to pay — Demurrer to complaint.*—A complaint, by one who alleges herself to be the sole child and administratrix of Emanuel Popper, deceased, insured in a solvent life insurance company, alleging that it is willing and ready to pay the amount of the policy provided she and the defendant Max Moses will sign a receipt for the money, that Moses refuses to sign, claiming that Popper assigned the policy to him, that the plaintiff is ignorant of the said assignment and that it is void or has been discharged, and praying for general relief, states a cause of action against Moses, and the action may be maintained as one to determine conflicting claims to a fund which, if not actually in court, is acknowledged by a solvent company to be due from it and which that company is willing to pay as soon as it be determined to whom payment should be made. Hasberg v. Moses, 25.

2. *To compel a conveyance for conspiracy and fraud — Voluntary trust when valid — Evidence not to be pleaded — Parties — Demurrer to complaint.*—A complaint which states that the plaintiff had an inchoate right of dower in a house then about to be sold in foreclosure, that the defendant Roberts bought it on the sale upon the trust to carry the house for the plaintiff until she could reimburse him, that the rents he collected therefrom and her payments to him exceeded his payments on and for the house, that he refused to reconvey to her upon the terms he had agreed upon, that upon her suing him for specific performance of the said trust or agreement he caused a mortgage upon the house to be foreclosed and conspired with the defendant Hills to buy it in in Hills' name but really for Roberts, states a cause of action against both defendants to compel them to convey to the plaintiff, and this although the complaint does not state that the trust agreement had a valuable consideration — a voluntary trust being enforcible when fully constituted — and although it is not alleged that the trust was evidenced as required by statute — it being unnecessary to plead evidence. Arnot v. Hills, 95.

3. *Tort — Joinder of causes of action.*—Although an injury to the person and one to personal property, both caused by the same tortious act, constitute two causes of action, both may be united in one complaint under Code C. P., § 484, subd. 9. Eagan v. New York Transportation Co., 111.

4. *Equity — Jurisdiction — Complaint for special relief on the foreclosure of a mechanic's lien — Costs not regulated by Code C. P., § 3228, subd. 4.*— A complaint, setting forth a mechanic's lien against certain real property in

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ACTIONS — Continued.

which the defendant Morgan L. Hadcock is described as owner, alleging that such was the ownership so far as known to the plaintiff when he filed his lien, that in fact the defendant Martha Hadcock was the owner when the work was done and the lien filed, and asking that it be adjudged an incumbrance on her interest in the property, that the lien be foreclosed, her interest sold, and the money brought into court for distribution, states a cause of action in equity and one cognizable only there, as special relief against the defective notice of lien is sought. Therefore the provisions of Code C. P., § 3228, subd. 4, do not apply to the action or limit the costs. Faville v. Hadcock, 397.

See **Attorneys; City of New York; Parties.**

ADULTERY.

See **Divorce.**

ADVERSE POSSESSION.

See **City of New York; Partition.**

AFFIDAVIT.

See **Bill of Particulars.**

AGENCY.

1. *Principal and agent — Complaint against an undisclosed principal — Election.*—A complaint, on behalf of bondholders under a railroad mortgage, which alleges that, upon a foreclosure and a sale by a master in chancery, a third person bid in the mortgaged property for a firm, whose obligations the defendants have assumed, for part cash furnished by the old firm and part notes made by him, the master retaining an express lien on the property sold to secure the notes, that they, not being paid by the third person, another sale was ordered, had, and confirmed, that the proceeds of the sale satisfied the payments ordered by the decree, that the old firm thereafter took the property and paid all the expenses in regard to the matter, and that, subsequently, the master, not then knowing that the third person had been acting as agent, sued him for a balance due upon the notes without result, states a good cause of action against the defendants to recover of them, as undisclosed principals, the amount due upon the notes. Suing upon an obligation of a person, at a time when his agency was undisclosed, does not show an election by the plaintiff to hold him and release his undisclosed principals, nor does a recovery against him release them. Ranger v. Thalmann, 420.

2. *When a mere selling agent is not authorized to warrant the quality of the goods.*—Where it is not shown that it is a custom of a trade for a mere selling agent to warrant the quality of the goods he sells and there is no proof that his principals, manufacturers of the goods, have authorized him to warrant quality, his statement to a vendee that the goods sold him by the agent are "all wool" does not bind his principals. Ellner v. Priestley, 535.

APPEAL.

1. *Demurrer overruled — Application to plead over where made.*— Where an interlocutory judgment, overruling a demurrer to a complaint with leave to withdraw the demurrer and plead over, is on appeal affirmed in the Appellate Division without granting such leave, the defendant must under Code C. P., § 497, apply to that tribunal, and not to the Special Term, for such leave. White v. Jackson, 218.

2. *Municipal Court of the city of New York — Amendments to a return how obtained before September 1, 1902 — Settlement of a case on appeal unauthorized before that date — Limit of time for moving for a new trial.*— Prior to September 1, 1902, when chapter 580 of the Laws of that year went into effect, there was no authority in a justice of the Municipal Court of the city

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APPEAL — Continued.

of New York to settle a case appealed therefrom, and amendments desired to his return could be obtained only by a motion for an amended return made under Code C. P., § 3055. Therefore where a defendant, who appealed in February, 1902, from a judgment of said court rendered against him in January, 1902, and procured a case on appeal to be settled by the trial justice, was dissatisfied with it as settled and moved for a resettlement or a new trial, the Appellate Term considered that, as there was no authority for the settlement, no appeal could lie to it from an order of the Municipal Court denying a resettlement, and that the motion for a new trial must be denied because it had not been made within five days after entry of the judgment as required by L. 1896, ch. 748. Cothren v. Chaffee, 339.

See **Pleading; Stay; Transfer Tax.**

ASSIGNMENT.

See **Judgment.**

ATTACHMENT.

1. *Levy upon a bond, secured by a mortgage, where insufficient to support a judgment, for money only, otherwise invalid.*—An attachment cannot be deemed to have been legally levied so as to save a judgment, for a sum of money only, recovered against the defendant without personal service of the summons upon her within the State of New York, where the proof of levy is that the sheriff, instead of taking into his custody a bond and mortgage due her (but not shown to have been within this State at the time of the levy) as he was required to do by law, merely accepted a certificate of the mortgagor that he was indebted to her upon the bond and mortgage in a sum named in the certificate. For such a purpose such a debt does not exist apart from the securities which represent it. Fiske v. Parke, 157.

2. *Action by a receiver to recover a debt — Attachment for a debt void where its situs is foreign — Payment to wrong party.*—A debt due from a foreign corporation to a foreign firm has no *situs* in the State of New York and cannot lawfully be attached here by a creditor of the corporation in an action against it, and hence payment therein affords the corporation no defense to a subsequent action by the firm's foreign receiver to recover the same debt, and the said payment has no greater effect than a mere voluntary one made to a third party. Allen v. United Cigar Stores Co., 500.

3. *A debt is "goods or effects" within Code C. P., § 657 — Sheriff.*— A sheriff may impanel a jury to try the validity of a claim, made by a third party, that a debt which the sheriff has attached as belonging to the defendant in the action really belongs to the third party, and this because a debt, although incapable of manual delivery, must be deemed "goods or effects" within Code C. P., § 657, and the sheriff, if he holds his levy on the debt, is entitled to be given a bond by the plaintiff in the action. Minor v. Gurley, 662.

See **Undertaking.**

ATTORNEY AND CLIENT.

See **Attorneys.**

ATTORNEYS.

1. *Client's right to change — Payment of, or security to, former attorneys.*— At any point in a suit or proceeding a client may arbitrarily change his attorneys, subject to the payment or the securing of the fees of his former attorneys provided their conduct has not been improper or neglectful. Where the cause of action was for negligence and damages, the court, in discontinuing a similar action begun for the client by the original attorneys, secured them out of any recovery he might ultimately obtain in the new action. O'Sullivan v. Metropolitan St. R. Co., 268.

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ATTORNEYS — Continued.

2. *Must account to the client for his money.*—Where attorneys receive, in their capacity as such, moneys of a client they must account to him for all of it except a reasonable sum for counsel fees and disbursements. The right to an accounting will not be denied him because of their interposition of technical objections. Matter of Keen, 374.

See **Lien.**

BAILMENT.

For hired work upon a thing — Bailee's duty to return it.— The relation which exists between a tailor who makes up clothing and clothing manufacturers who furnish him the cut goods to make up is that of bailee and bailor, requiring the former to return the goods, and therefore where, after they have been stolen from the bailee, he sues for the value of his work upon the goods his mere testimony that he had nothing to do with the theft of them affords no defense to the manufacturers' counterclaim for their value. Rothoser v. Cosel, 337.

BANKRUPTCY.

1. *Act of* 1898 — *Trustee's action — Preference — When a transfer intended to hinder creditors avoids the whole consideration whether past or present.*— If, within four months of a debtor's filing a petition in bankruptcy and at a time when the aggregate of his property is not at a fair valuation sufficient in amount to pay his debts, a creditor takes a transfer from him which the creditor has reasonable cause to believe is intended to give him a preference and which has that result, the trustee in bankruptcy of the debtor may avoid the transfer and recover of the creditor the transferred property or its value. If the said transfer was intended to hinder, delay or defraud creditors and the preferred creditor knew this or was put on inquiry in regard to it, he loses the whole consideration he paid whether past or present. Johnson v. Cohn, 189.

2. *Law of* 1898 — *Trustee's action to set aside a bankrupt's chattel mortgage and his transfers — When the mortgagee is not a bona fide holder under section 70e — Transfers more than four months old when voidable — When a fraudulent transferee is not a necessary party.*— A mortgagee, who knows that the mortgagor is selling the mortgaged chattels for his own use and who consents to his doing so, is not a *bona fide* holder of the mortgage within the meaning of the Bankruptcy Law of 1898, section 70e, and therefore the mortgagor's trustee in bankruptcy may under said section have the mortgage set aside as fraudulent and void as to other creditors. Where the owner of personalty remains in possession or control of it at all times and until his bankruptcy, transfers, unexplained by the transferees, which he alleges he made five months before bankruptcy, must, under the Personal Property Law (L. 1897, ch. 417, § 25), be deemed conclusively fraudulent and the trustee of the bankrupt may avoid them and recover the property or its value. A fraudulent transferee who has transferred to another fraudulent transferee all the property rights which she received under her transfer is not a necessary party to the trustee's action. Skillen v. Endelman, 261.

See **Contempt; Creditor's Action; Pleading.**

BANKRUPT ACT.

See **Bankruptcy.**

BANKS.

National — Owner of a lost certificate of stock therein may apply, under L. 1892, ch. 688, §§ 50, 51, for the issue by the bank of a new one.— The provisions of the Stock Corporation Law (L. 1892, ch. 688, §§ 50, 51), relative to the right of an owner of a lost certificate of stock to apply to the Supreme Court of the State of New York for an order that the corporation issuing the stock show cause why it should not issue a new one instead of the one lost,

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BANKS — Continued.

do not conflict with the Constitution or statutes of the United States and may be invoked by a stockholder of a national bank who has lost her certificate of stock therein. Matter of Hayt, 356.

See **Taxes.**

BENEFIT SOCIETIES.

Constitution — Failure to suspend a member in default.—Where the constitution of a benevolent order provides that if at the time of his death a member is indebted to his lodge in a sum equal to six months' dues and assessments, or either, his widow shall not be entitled to any endowment, she cannot, where he died so indebted, recover any death benefit of the grand lodge, and this irrespective of the question whether his lodge had complied with a further clause of the said constitution providing for the suspension, upon notice, of a member so indebted and the striking of his name from the roll. Phillips v. United States Grand Lodge, 296.

BILL OF PARTICULARS.

When an attorney for a party may make the moving affidavit.— The rule of practice, that a motion to procure a bill of particulars must be upon the affidavit of the party and not upon that of his attorney, is not absolute. Where a complaint for divorce was entirely indefinite as to the time, place, or person, when, where, or with whom, the adulteries charged therein were committed, and all charges were denied by a verified answer, such a motion was granted upon the defendant's attorney's affidavit that he could not safely go to trial without particulars as to the times, places and persons — the court considering that, as the case was one where a bill should be ordered and the defendant clearly could have no knowledge of the particulars superior to that of his attorney, the attorney was the better judge whether the case could safely be tried without them. Kirkland v. Kirkland, 423.

BILLS, NOTES AND CHECKS.

See **Negotiable Instruments.**

BOARD OF RAILROAD COMMISSIONERS.

See **Railroads.**

BOARDING-HOUSE KEEPER.

See **Lien.**

BONDS.

See **Liquor Tax Law; Principal and Surety.**

BOUNDARIES.

1. *Deed.*— A conveyance of land, bounded by an existing road, is presumed to carry the fee to the center thereof and express words, limiting the grant to the margin thereof, are necessary to overcome the presumption. The presumption is strengthened where the deed discloses an intention upon the part of the grantor to dispose of all of his estate in the land and where it is sold by reference to a map which shows the road as existing. Van Winkle v. Van Winkle, 593.

2. *Deed — Title to "superincumbent materials" in a street.*— An owner of a lot bounded on the south by the north "side" of a street does not own the fee of that street to its center. Where a city paves and curbs the street and assesses the expense *pro rata* on the owner of the lot and thereafter repaves the street by a contractor and digs up the old curbing, it, if useful to the repaving, would not belong to the owner of the lot as "superincumbent materials" placed upon it even if he owned to the center of the street, as the city has a paramount right to use such materials to repave the street, and, besides, the owner of the lot neither owned the curbing nor put it in the street. Jacquemin v. Finnegan, 628.

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BROKERS.

Contract — Illegality of object — A real estate broker who offers to sell without written authority from the owner (L. 1901, ch. 128) cannot recover of him commissions.— A real estate broker of a city of the first or second class who offers for sale real property without written authority from the owner, etc., is guilty of a misdemeanor under L. 1901, ch. 128, and therefore the broker can recover no commissions of the owner on a sale made, as the transaction is made illegal by the statute. Whiteley v. Terry, 93.

See **Stock.**

CARRIERS.

Passenger's independent contract for the carriage of goods not his own — Measure of damages.— A passenger may, by a contract independent of that for the transportation of himself and his baggage, bind a railroad carrier to his employer, as undisclosed principal, for the transportation with himself of samples of the latter's goods. Such a contract may exist where the passenger pays, and the carrier's checking agent accepts, the proper excess baggage rates on trunks containing, among other things, the employer's goods and the agent checks the trunks and gives a voucher for the excess payment. Damages cannot be awarded unless there is an accurate basis for them. Talcott v. Wabash R. R. Co., 443.

CERTIORARI.

New York city — Limit of time to review, by certiorari, an assessment.— L. 1901, ch. 466, § 906, governs a certiorari to review or correct a final determination of the board of taxes and assessments of the city of New York and, within that section, such a proceeding is "begun" where, before the first day of November in the year in which the said determination was made, a petition for the writ is presented and an order for its issue is granted. It is not requisite that the writ should be served before the said November first. People ex rel. Taber Prang Art Co. v. Wells, 602.

See **Railroads; Stock; Taxes.**

CITY OF NEW YORK.

1. *Rapid transit — The contractor with the city must pay the cost of constructing, in the subways, ducts for electricity, the motive power.*— In passing the acts relative to rapid transit in the city of New York the Legislature intended that the contractor with the city should bear every expense connected with the motive power and the means of operation. The cost of constructing, in the side walls of the subways or tunnels, conduits, placed in ducts, for conducting electricity, the selected motive power, must be borne by the contractor as constituting "equipment" within the legislation and the contract, and the rapid transit commission cannot, by voting this cost to be extra work, change its character to "construction" payable by the city. McDonald v. Grout, 18.

2. *Grant of water lots at the foot of 42d and 43d streets, Hudson river — A city cannot grant away a public pier lying wholly within the lines of a street — Adverse possession not applicable to a public nuisance — Permissible variation in the manner of making an enforced public improvement — The city's rights in its water lots.*— In 1850 the city of New York conveyed to one Lindsley water lots in the Hudson river, bounded on the north and south respectively by the center lines of 43d and 42d streets, on the east by high water mark and on the west by the westerly line of 13th ave., "the permanent exterior line of said city", so much of 12th and 13th aves. and 43d and 42d sts., shown on annexed maps, as came within the boundaries being excepted, and he agreed at his own expense to make these streets and avenues, then having no potential existence, as well as wharves and bulkheads forming a part thereof, when ordered to do so by the city. In 1852 it conveyed to him a pier, just north of the water lots, lying wholly within the lines of 43d street, at its foot and in 12th ave. also. In 1855 Lindsley conveyed all to one La Farge and thereafter by *mesne* conveyances under the latter the pier came to the plaintiff, and the water lots, which were essential to the use of the south side of the

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pier and were so used after 1860, to the defendant railroad company. In 1873 the pier was extended by the city upon the plaintiff's agreement to pay it rent for the extension and to claim no title to the extension. In 1890 the defendant, the department of docks, upon the footing of the deed of 1850, by resolution, ordered the said railroad company to construct a bulkhead in front of its water lots between the south side of 43d street and the south side of 42d street, and as this would have had the effect of filling in the land under water south of the plaintiff's pier, as originally constructed, it brought this action before 1892 for an injunction. In 1897 the resolution for a bulkhead was rescinded but in 1900 the board ordered the railroad company to construct 12th ave. between the middle of 43d street and the middle of 42d street — which would have been equally detrimental to the south side of the pier. Held, that the action could not be maintained as the plaintiff had shown no title to the pier or the land under it. That the city of New York had no power to grant away a public pier located entirely within the boundaries of a street held in trust by it for public use. That as to the extension of the pier the plaintiff was only a licensee of the city. That nearly forty years' occupation of the pier could give the plaintiff no title thereto by adverse possession as its occupation thereof constituted a public nuisance. That the defendant railroad company might lawfully construct a bulkhead across the water lots where that form of construction was required by the Legislature and where the result of it would practically be the same as if 12th ave. had been filled in. A statement of the rights of the city of New York, borough of Manhattan, in its lands under water. Knickerbocker Ice Co. v. Forty-second Street & Grand Street Ferry R. R. Co., 27.

3. *Grant of lands under water at the foot of 90th and 91st streets, East river — Exception of "Exterior Street" — Name of the water at the foot of said streets — Covenant authorizing the city to control the improvement of "Exterior Street" — Implied reservation to it of an easement to reach its bulkhead.*— Where the city of New York grants in 1869 lands under water on the east side of Manhattan island between 90th and 91st streets, designates a part of the lands, upon a map attached to the deed, as "Exterior Street" and excepts from the grant so much of the premises as form a part of any street in use or that "may now or hereafter be assigned, designated or laid out through said premises according to law", the city retains absolute title, as against a *mesne* grantee of its grantee, to so much of the premises as are comprised in "Exterior Street" whether or not that street was then laid out "according to law." *Semble*, that the water at the foot of said streets is not the Harlem river but is the East river or Sound. Where the city's deed bound its grantee, his heirs and assigns, not to construct, without its permission, on the premises excepted, any wharves, bulkheads, avenues or streets or build any wharf or pier in the river in front of the premises granted, the city can prevent any improvement of the space designated as "Exterior Street" from being made without its permission; and where the deed also excepted and reserved the wharfage from the bulkhead in front of 90th and 91st streets, the city impliedly reserves to itself an easement over the granted premises, for a reasonable distance north of 90th and south of 91st street, for its access to its said bulkhead. Whitman v. City of New York, 43.

4. *Female public school teacher entitled to the issue of a certificate of her salary (necessary to payment) despite her marriage.*—The city superintendent of schools of the city of New York cannot lawfully refuse to certify to the auditor of the board — an act necessary to payment — the salary of a woman, permanently appointed in 1891 a teacher in a public school in Brooklyn and who, while still in service, married on Jan. 21, 1902, upon the ground that the by-laws of the school board of Kings in force on Jan. 21, 1902, provided among other things: "Should a female principal, head of department or teacher marry, her place shall thereupon become vacant", and this because the by-laws of a school board of the city of New York are precluded by its charter of 1897 from conflicting therewith, the charter provisions contemplate

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CITY OF NEW YORK — Continued.
the removal of teachers only upon charges preferred and after a trial, and the by-law cannot of itself, without affirmative action upon the part of the board, create a vacancy. Matter of Murphy, 166.

5. *Meaning of a "passageway" in a city place of amusement as used in L. 1897, ch. 378, § 762.*— Where the manager of a place of amusement in the borough of Manhattan keeps unobstructed during a public performance, the passageways of the orchestra circle and the spaces on the same floor leading from these passageways directly to the doors of ingress to and egress from the auditorium, he does not subject himself to the penalty, imposed by the charter of the city of New York (L. 1897, ch. 378, §§ 762, 773) upon such a manager for failing, upon notice so to do from a member of the uniformed force of the city fire department, to cause the removal of persons standing or sitting during a public performance "in any passageway" of such a place, by permitting several hundred persons holding merely tickets of admission to stand during the performance in the space between the orchestra circle and the rear wall of the auditorium, from which the chairs had been removed — and this because such space is not to be deemed a "passageway" where the evidence shows that it was neither accustomed to be nor needed to be used as such. Sturgis v. Grau, 330.

6. *Commissioner of water supply's discretion as to the kind of water meter to be used in the city.*— Under the charter of the city of New York (L. 1897, ch. 378, § 475, as amd. L. 1901, ch. 466), the commissioner of water supply has discretion as to the kind of water meter to be used in the city and while he cannot cause to be placed in a building a water meter which the board of aldermen has not approved as to pattern and price, he cannot be compelled to permit to be placed in a building a water meter, although so approved by the board, which the tests of his experts have shown to be inherently defective when applied to the proposed use and under such conditions of pressure and flow as obtain in the city. People ex rel. Standard Water Meter Co. v. Monroe, 369.

7. *Interest on an award, for property condemned, where title to it vests in the city before confirmation of the commissioners' report.*— Where the board of public improvements of the city of New York has by resolution declared that title to property to be taken for city purposes by commissioners of estimate and apportionment shall vest in the city before confirmation of their report, the city charter (L. 1897, ch. 378, § 90), authorizes them to allow, and include in their assessment for benefit, interest on the value of the said property from the date of its vesting in the city to the date of their report. This declaration of the rule of damages is one within the power of the Legislature. Matter of East One Hundred and Fifty-eighth Street, 598.

8. *Salary of a department clerk during his suspension.*— Under L. 1901, ch. 466, § 1453, a clerk, of a department of the city of New York abolished on Jan. 1, 1902, unlawfully removed therefrom on Aug. 20, 1901, reinstated therein by a court order on Jan. 27, 1902, and re-employed on June 10, 1902 at the same salary by the borough president upon whom the duties of the department had devolved, is not entitled to salary from Jan. 1, 1902 to June 10, 1902. Kastor v. City of New York, 709.

9. *Misdemeanor — Loitering in a city thoroughfare for the purposes of prostitution.*— The offense (L. 1882, ch. 410, § 1458) of loitering or being in any thoroughfare or public place of the city of New York for the purposes of prostitution or solicitation is a misdemeanor and as such is beyond the jurisdiction of a city magistrate and triable only by courts of special sessions. This specific misdemeanor is to be distinguished from the offenses of vagrancy, or of being a disorderly person. A city magistrate's commitment of a woman, charged with this misdemeanor, to imprisonment in the county penitentiary, after he has found her "guilty of such disorderly conduct as in my (his) opinion tends to a breach of the peace", cannot be justified under the Con-

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CITY OF NEW YORK — Continued.

solidation Act or the existing charter of the city and is void in any view. People ex rel. Forster v. Warden, 700.

10. *Municipal grant of lands under water on the Harlem river.*— In 1865 the city of New York granted to the plaintiffs' *mesne* grantors, as owners of the adjacent upland, lands under water on the Harlem river extending from high water mark to the bulkhead line as established in 1859, and the grant made that line the easterly boundary of the premises. Along that line the city had before 1859 laid out an exterior street but never has constructed it. The grant reserved to the city streets and avenues existing, or shown on an annexed map, but required the grantees to construct them, as well as wharves and bulkheads, on three months' notice. The city granted to the grantees all wharfage, etc., from "that part of the exterior line of the said city lying on the easterly side of the hereby granted premises fronting on the Harlem river". In 1873 Seventh avenue, an avenue within the boundaries of the grant, was made at the expense of the abutting owners and was lawfully carried out to the bulkhead line. The city licensed certain structures, floating or on piles, to be placed within the boundaries of the grant along and outside of the bulkhead line; and in 1897 of its own motion built at the foot of Seventh avenue along the bulkhead line a permanent bulkhead platform and began and has since continued to collect wharfage, etc., therefrom. Held, that the plaintiffs were entitled to the removal of any of the said structures, floating or on piles, located on lands lying between the streets and avenues and to have the city enjoined from granting any similar licenses hereafter, but that, so long as the exterior street remained unconstructed, they were not entitled to the removal of any structures (excluding from consideration the bulkhead platform at the foot of Seventh avenue) which laid wholly within the lines of the projected streets. That the words of the grant gave the plaintiffs the right to wharfage, etc., from the exterior street when constructed, and that, as the city had elected to construct the bulkhead platform, at the foot of Seventh avenue, without requiring or permitting the plaintiffs to do so, the city must account to them for the wharfage collected there by it or pay them the permanent value of their rights, if the city should elect to retain the bulkhead platform for its own use. Hastings v. City of New York, 728.

See **Certiorari; Civil Service; Criminal Law; Ejectment; Injunction; Municipal Corporations.**

CIVIL SERVICE.

Status of the cashier of the commissioner of public works of the city of New York.— A cashier, of the commissioner of public works of the city of New York, who issues permits to open streets, receives money for them, enters the moneys and accounts for them weekly to the city chamberlain, receives, enters, and accounts for moneys deposited as special security against damage to sidewalk pavements, and receives from other bureaus in the department of highways, and accounts for, all moneys paid them, is not a "regular clerk", within L. 1897, ch. 378, § 1543, as amended by L. 1901, ch. 466, but holds a confidential position, and therefore may be discharged therefrom summarily and especially where his position is classified in the non-competitive list. Matter of Wiegand, 454.

CLOUD ON TITLE.

Marketable title.— A written agreement, between owners, named Hilkemeyer and Sternkopf, of lots which adjoin, binding them, their personal representatives and heirs, declared therein to be one which "shall at all times be construed as a covenant running with the land," limiting the depth to which foundations may be sunk on their respective lots at the line dividing them, and binding Hilkemeyer should he go deeper to protect at his own expense Sternkopf's wall, is, whatever may be its precise legal nature, such a cloud upon the title of Hilkemeyer that a purchaser from one claiming under him should not be required to complete and particularly where Sternkopf is not before the court. Leinhardt v. Kalchheim, 308.

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COAL.
See **Municipal Corporations.**

CODE OF CIVIL PROCEDURE.
§ 66. Fromme v. Union Surety & Guaranty Co., 105.
§ 382, subd. 2. Matter of Moench, 480.
§ 388. Schrieber v. Goldsmith, 381.
§ 452. City of Ironwood v. Coffin, 278.
§ 484, subd. 9. Eagan v. New York Transportation Co., 111.
§ 497. White v. Jackson, 218.
§ 544. Burke v. Rhoads, 208.
§ 603. Veit v. Collins, 39.
§ 603. Le Roy v. Chesebrough, 285.
§ 657. Minor v. Gurley, 662.
§ 780. Stryker v. Churchill, 578.
§ 829. Putnam v. Lincoln Safe Deposit Co., 738.
§ 1229. Goldie v. Goldie, 389.
§ 1391. Leggett v. Waller, 408.
§§ 1909, 1917. Zander v. New York Security & Trust Co., 98.
§§ 2131, 2140. People ex rel. Croker v. Sturgis, 448.
§ 2250. Lauria v. Capobianco, 441.
§ 2253. Lesser v. Stein, 349.
§ 2286. Matter of Collins, 753.
§ 2472, subd. 4. Matter of Miner, 605.
§§ 2561, 2562. Matter of Mitchell, 120.
§§ 2600, 2601. Matter of Sogaard, 519.
§ 2713. Matter of Page, 220.
§ 2719. Matter of Gilman, 762.
§ 2722. Matter of Miner, 605.
§ 2743. Matter of Wait, 74.
§ 3055. Cothren v. Chaffee, 339.
§ 3076, subd. 2. Lauria v. Capobianco, 441.
§ 3228, subd. 4. Faville v. Hadcock, 397.
§§ 3240, 3253. Lauria v. Capobianco, 441.

CODE OF CRIMINAL PROCEDURE.
§ 308. People v. Di Medicis, 438.
§ 915. People ex rel. Kroncke v. O'Brien, 109.

CODICIL.
See **Will.**

COMPLAINT.
See **Pleading.**

CONDEMNATION PROCEEDINGS.
See **City of New York.**

CONSIDERATION.

Forbearance to sue — Collateral liability for any deficiency on foreclosure.— A bank, holding upon premises a mortgage, one of whose mortgagors has suddenly become bankrupt, which informs the present owner of the fee that it will under its rules at once take action in the matter unless it is given additional security for the loan, in the form of his collateral bond, and which, after receiving the same from him, forbears for three years from foreclosing the mortgage, creates for the collateral bond a valuable consideration moving to the owner of the fee, and is entitled to have the decree in foreclosure provide that he be liable for any deficiency. Forbearance to sue upon an overdue claim is a sufficient consideration for the promise of a third person to pay the debt — even though no definite time of forbearance be fixed — provided there is forbearance for a reasonable time. German Savings Bank v. Brodsky, 100.

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CONSOLIDATED STOCK AND PETROLEUM EXCHANGE.
See Supplementary Proceedings.

CONSTITUTIONAL LAW.

1. *Crimes — Indeterminate sentences of felons — Pardoning power — Statute not ordinarily to be declared unconstitutional at Special Term.*— The first clause of the Penal Code, § 687a, enacted by L. 1901, ch. 425, and providing indeterminate sentences for felons, is constitutional. A sentence thereunder is not void for the uncertainty of the duration of the term as the sentence is to be deemed a definite one for the maximum duration of the term. The statutory provisions which permit a prisoner to be pardoned by a "board of commissioners of parole prisoners" (L. 1889, ch. 382, as amd.) are constitutional. The court at Special Term should not declare a statute unconstitutional unless it clearly is so. People ex rel. Clark v. Warden, 113.

2. *Office — Unconstitutionality of Penal Code, § 41x.*— The provisions of the Penal Code, § 41x, forfeiting the office of an elected candidate for his failure within ten days after the election to file a sworn itemized statement of his election expenses, are repugnant to the State Constitution, art. XIII, § 1, since they prescribe an oath different from the one required by it and it declares that "no other oath, declaration or test shall be required as a qualification for any office of public trust". Stryker v. Churchill, 578.

See **Criminal Law.**

CONTEMPT.

1. *Civil — Failure of a son to support his mother as directed.*— Disobedience of an order, of the Court of General Sessions of the Peace in and for the city and county of New York, made under Code Crim. Pro., § 915, and directing a son to support his mother, is a civil, and is not a criminal contempt and therefore he may be punished for it by an imprisonment exceeding thirty days. People ex rel. Kroncke v. O'Brien, 109.

2. *Civil — Release of offender refused — Code C. P., § 2286 — Adjudicated a bankrupt.*— A person imprisoned for a civil contempt, in having failed to comply with a surrogate's decree directing him to pay a sum of money representing his *devastavit* of an estate of which he had been an administrator, should not be discharged, under Code C. P., § 2286, upon his uncorroborated statement that he is unable to pay the sum where it appears that the surrogate's decision also found him guilty of fraud and perjury, and that he fled from the jurisdiction upon the day before the decree was entered upon the decision and remained away for some time. His having been adjudicated a bankrupt affords no reason why he should be discharged from imprisonment. Matter of Collins, 753.

CONTRACT.

1. *Mere recital of a seal — Executed parol modification.*— If in fact no seal has ever been affixed to an instrument it is not made a sealed instrument by a recital therein that the parties thereto have set their hands and seals to it. Where such an instrument has been modified by parol and has been executed as modified the contractor may recover upon it as modified. Davis v. Bingham, 299.

2. *Reformation of, for mutual mistake, denied — Failure of proof of mistake.*— Reformation of a contract cannot be decreed for mutual mistake unless there is convincing proof that there was such a mistake and also what the real agreement was. Proof that, before a contract to sell land was drawn by the vendee's agent, he had in his possession a policy, insuring the title, and that a schedule annexed thereto set up the building restriction by its date and the book and page of the record of it, does not, without more, show that the vendee must have intended the contract to be so drawn as that the title should be subject to the building restriction. Roussel v. Lux, 508.

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CONTRACT — Continued.

3. *Relief from a mistake made in splitting an entire demand.*— Where a dispute has arisen, under a contract permitting a corporation to cut timber from lands, as to the amount cut up to Oct. 1, and the owners of the lands sue the corporation, on Dec. 22, for the value of so much timber as they allege had been cut up to Oct. 1, and recover judgment therefor without a contest, the court will, on their motion, vacate the judgment and consolidate a second action, brought by them, after Dec. 22, for the value of the timber cut by the corporation on the same lands in Oct. and Nov., to the end that the judgment in the first action may not be a bar to the second action — it appearing that the plaintiffs supposed, when they brought the first action, on Dec. 22, at a time when payment was also due for the timber cut in Oct. and Nov., that there was no dispute as to the amount of that timber and that the corporation would pay for it without any controversy. Rockefeller v. St. Regis Paper Co., 746.

See **Brokers; Corporations; Damages; Evidence; Municipal Corporations; Pleading; Principal and Surety; Sales; Specific Performance; Title.**

CONVERSION.

See **Executors and Administrators.**

CORPORATIONS.

1. *Liability of stockholders to creditors, how modified by and how enforced under L.* 1901, *ch.* 354.— Where an insolvent domestic stock corporation has been voluntarily dissolved, a permanent receiver thereof appointed, and creditors restrained from suing it, a creditor thereof cannot himself later enforce the liability of stockholders to creditors as established by the Stock Corporation Law (L. 1892, ch. 688, § 54, as amd. L. 1901, ch. 354) and therein declared to be an amount equal to the amount unpaid on the stock of the stockholder for debts of the corporation contracted while he held the stock, and this because the said liability passes to the receiver as an asset of the corporation and the creditor cannot sue upon it unless the receiver will not. This liability, as it existed before the said amendment of 1901, enured to the benefit of creditors, was not an asset of the corporation, did not pass to a receiver, and he could not enforce it. Lang v. Lutz, 3.

2. *When the liability of one who signs a subscription agreement becomes absolute — Offer and acceptance.*— The signing of a paper stating that the signers "subscribe" for the number of shares, set opposite their names, in a corporation in process of formation under the Business Corporation Law (L. 1890, chap. 567), and that they agree to pay for their stock when called upon by the directors, followed by the filing of a proper certificate of incorporation and subsequent demands of the corporation for payment of the full subscription, make a signer liable therefor and this although the certificate does not name him as a subscriber and he never took any part in the incorporation or in the affairs of the corporation and never demanded or was tendered the stock. Woods Motor Vehicle Co. v. Brady, 79.

3. *Contract between it and its president for the use of his inventions.*— A contract, made under a resolution passed in good faith by a vote of the majority of the trustees of a manufacturing corporation, the president not voting, by the terms of which he, serving it without salary, licenses it, for five years and for a royalty found to be fair, to make and use machines containing new inventions made and patented by him and which have proved valuable to the business, is valid and is not subject to attack by a stockholder as fraudulent and void as to him and the corporation. The corporation has inherently no actual or implied license to use without compensation to him the inventions of its president, and the rule is not changed by the fact

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CORPORATIONS — Continued.

that the experimental work on them was done in the plant of the corporation by its employees, where the president paid for it out of his own funds. Burden v. Burden Iron Co., 560.

4. *Power of president to bind it — Ultra vires.*— Where the selling agents of a coal mining company make advances to it necessary to the conduct of its business, the president of a successor company, which, on a foreclosure, of the property, took it and the assets over and continued the same relations with the agents, has power to bind his company to pay the agents their advances to the old company, there being some evidence that, from other sources than its president, knowledge of the assumption of the debt had been brought home to the successor company. A corporation's plea of *ultra vires* should not be favored where it will work injustice to its debtors. Curtis v. Natalie Anthracite Coal Co., 586.

See **Attachment; Banks; Contract; Depositions; Negligence; Parties; Railroads; Statute of Limitations; Supplementary Proceedings; Taxes.**

COSTS.

1. *Summary proceedings — Code C. P.*, §§ 2250; 3076, *subd.* 2; 3240; 3253.— A landlord who suceeds in a summary proceeding, not involving a forcible entry or detainer, is entitled, under Code C. P., §§ 2250, 3076, subd. 2, to ten dollars costs and no more, and is not entitled to an extra allowance under Code C. P., § 3253. Code C. P., § 3240, does not apply to a summary proceeding. Lauria v. Capobianco, 441.

2. *Infant suing as a poor person.*— An infant, not being of ability to sue, who alleges that she has a cause of action against the defendant, may be permitted by an order of the court to prosecute as a poor person and the mere fact that her father and guardian *ad litem* is a responsible person affords no reason why the court should vacate the said order and require her to give security for costs. Gallagher v. Geneva, Waterloo, Seneca Falls & Cayuga Lake Traction Co., 637.

See **Actions; Criminal Law; Executors and Administrators.**

COUNTERCLAIM.

See **Pleading.**

COURT OF GENERAL SESSIONS.

See **Contempt.**

CREDITOR'S ACTION.

1. *Under the Personal Property Law to set aside a deceased insolvent's transfer as in fraud of creditors — Right to sue — Preference — Taking with notice of creditors' rights.*— Where a judgment creditor of a deceased insolvent sues, under L. 1897, ch. 417, § 7, on behalf of itself and all other creditors, to require the defendant, the insolvent's widow, to account for certain stock alleged to have been transferred to her by him in fraud of his creditors and for his own use, the complaint is not insufficient merely because it fails to allege that the insolvent's administrator had upon request refused to sue — and this because the said statute makes the creditor's right to sue primary. It is not a defense to such an action for the widow to allege a transaction occurring between the plaintiff, the insolvent and certain creditors after his insolvency by which they and the plaintiff secured a preference, as a failing debtor may lawfully prefer a creditor and the latter may accept the preference provided he is without knowledge of the debtor's fraudulent intent. Where the widow received the stock in suit with notice of equities therein in favor of her husband's creditors, it is not a defense to her that she is assignee under one of said preferred creditors of a claim against her husband which

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CREDITOR'S ACTION — Continued.

exceeds the value of the stock the plaintiff seeks to reach. National Bank of Republic v. Thurber, 13.

2. *Motion by the trustee in bankruptcy of the debtors for his substitution as plaintiff.*— Where a judgment creditor of a firm brings an action to set aside certain firm transfers, confessions of judgment, executions thereon, and conveyances, all relating to firm property, and serves the summons therein on one partner of the firm more than four months before it files a petition in bankruptcy, the judgment creditor acquires a lien, enforcible for its exclusive benefit, upon all the choses in action and equitable assets of the firm, and therefore the trustee in bankruptcy of the firm has no title upon which to demand that he be substituted as plaintiff, in the action, in the place and stead of the creditor, to the end that he may prosecute the action for the benefit of the estate of the bankrupts. Ninth National Bank v. Moses, 664.

CRIMINAL LAW.

1. *Allowance to counsel assigned to defend one charged with an offense punishable by death — Code Crim. Pro.*, § 308.— Where a defendant, charged in the indictment with an offense punishable by death, is duly arraigned therefor and then and there appears by counsel and pleads not guilty thereof, the Code of Criminal Procedure, the only authority for such an allowance, affords the criminal court, in which he was tried, no authority to make counsel, assigned him as such at a later term of the court when he did not appear either for arraignment or trial, an allowance for having subsequently defended him. People v. Di Medicis, 438.

2. *Gambling — The information — Exclusion of the public from the investigation — A witness must answer a proper question although it may tend to convict him.*— An information wherein the district attorney of the county of New York alleges upon information and belief that, in the city and county of New York on Jan. 1, 1901, and thereafter continuously until Dec. 1, 1901, one Richard A. Canfield did at said city, in premises described by their street number, use and allow to be used certain rooms for the purpose of gambling, is sufficient under Code Crim. Pro., § 148, to confer upon a magistrate of the said city jurisdiction to inquire into the charge and subpœna and examine witnesses, and he may also exclude the public from the investigation. A witness who refuses to answer a proper question at such an investigation relative to gambling is guilty of a misdemeanor, under Penal Code, § 143. Assuming that a question put him — whether he had ever been in the said premises — if answered, might afford the prosecutor some facilities for fastening the crime of gambling upon him, the witness must answer, as the indemnity afforded him by Penal Code, § 342, meets and overcomes the protection of the State constitutional provision (art. I, § 6) that no person shall be compelled in any criminal case to be a witness against himself. The proceeding being taken under the law of the State of New York and before a magistrate of this State, the witness cannot claim absolute immunity or any immunity under the different and broader rule in the Federal courts, in regard to the privilege of a witness, as declared upon a construction of the fifth amendment to the Constitution of the United States — identical in phraseology with the said provision of our State Constitution — and this because the first ten of those amendments do not restrict the powers of a State, and the scope of the fifth amendment was not enlarged by that part of the fourteenth amendment which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, etc. People ex rel. Lewisohn v. Wyatt, 456.

3. *Perjury — Proof necessary to a warrant.*— A magistrate has no power to issue a warrant for the arrest of a person upon a charge of perjury where it is denied by him and the complainant's proof rests on his oath alone uncorroborated by any independent circumstances. The testimony before the

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CRIMINAL LAW — Continued.

magistrate need not be convincing, but before he can issue a warrant for a crime he must have legal evidence that a crime has been committed. People ex rel. Jacobs v. McGirr, 471.

4. *Commitment of a female under L.* 1886, *ch.* 353.— A magistrate of the city of New York may, under L. 1886, ch. 353, commit a female, over twelve years of age, charged by her mother with wilful disobedience to her, found guilty of being in danger of being morally depraved, and who has not been an inmate of the penitentiary, to one of the three institutions named in the statute, but he cannot lawfully commit her to any other institution or to the New York Magdalen Benevolent Society. People ex rel. Joyce v. New York Magdalen Benevolent Society, 588.

See **Constitutional Law; Habeas Corpus; Motions and Orders.**

DAMAGES.

Specific performance — Recoverable, in the action, for a fraudulent breach although performance is impossible — Their measure.— Although specific performance of an executory contract for the sale of lands cannot be awarded, in an action brought therefor by the assignee of the vendee, because it turns out that the wife of the vendor, neither a party to the action nor to the contract or within the jurisdiction, refuses to convey, damages may be awarded therein against the vendor where he has been guilty of a fraud in regard to the title which would have prevented performance even if his wife had been willing to convey. The recoverable damages are the payment made on signing the contract with interest thereon, the expenses of searching the title, the difference between the market value of the premises and the contract price, and the costs of the action. Schorr v. Gewirz, 186.

See **Carriers; Depositions; Lease.**

DECEDENTS' ESTATES.

Services in the family relation — Consent and short statute as to a disputed claim against an estate.— A claim of an executrix, the sister of a testatrix, for nursing her during the last four years of her life must be closely scrutinized and clearly supported, and especially where the testatrix who had money in hand had never made the claimant any payment whatever on account of the alleged services. While the surrogate may upon a judicial settlement hear the disputed claim of an executrix against her testatrix' estate, he cannot then hear an ordinary disputed claim unless a consent is filed. A claim against an estate is barred where executors reject it and the claimant waits two years without suing upon it or having it referred. Matter of Warner, 432.

See **Surrogate's Court.**

DEEDS.

1. *Seal not requisite.*— A conveyance of real estate in fee in the State of New York does not require a seal since the passage of the Real Property Law (L. 1896, ch. 547). Leask v. Horton, 144.

2. *Of gift — Reformation.*— Proof that a mother who intended to give only the reversion, after her death, in her real estate to her daughter — as her daughter understood — executed and delivered a deed which, by the mistake of the scrivener, first gave the daughter a fee absolute and then attempted to cut it down by certain repugnant provisions in favor of the mother during life, presents a proper case for reformation of the deed to the end that it may correctly express the real agreement and intention of the parties. Schrieber v. Goldsmith, 381.

See **Boundaries; Taxes; Title.**

DEFAULT.

See **Municipal Court of New York.**

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DEMURRER.
See Pleading.

DEPOSITIONS.
1. *Examination, before issue joined, to frame a complaint — Requisites — Refused where the plaintiff's affidavit sufficiently states a cause of action — How far conspiracy and fraud should be pleaded in deceit — Damages need not be accurately stated.*— A plaintiff cannot obtain an examination of certain defendants in order to frame his complaint unless his affidavit on the motion shows that he presently has a cause of action — not necessarily a complete one — nor unless the affidavit also shows by facts and circumstances that an examination is material and necessary, it appearing that he has not information sufficient to frame a complaint and that the defendants have substantive information which ought to be stated therein in order to support the cause of action or procure adequate relief. Where a stockholder of the American Tobacco Company, who had exchanged some of his common stock for the bonds of a consolidated company, alleged by his affidavit, that the defendants, directors of his company (made defendants with other corporations and directors thereof who had gone into the consolidation) had deceived him as to the value of his stock and had at his expense enriched themselves, by the exchange, to his damage in the difference between the interest paid on the bonds and the actual earning capacity of his stock, and the affidavit proceeded on the theory that he had been damaged as an individual and only as such, the court refused to allow him to examine before trial certain of his directors, holding that, as he had alleged misrepresentation with *scienter*, deception and injury, he had a sufficient basis to enable him to frame a complaint in an action for deceit and damages. That he could not examine the said defendants as to the alleged conspiracy to defraud him by the consolidation and for the reason that in deceit a conspiracy need not be alleged in order to be proved. That if there had been fraud the plaintiff was not entitled to "precise information" in regard to it since he could allege fraud on information and belief. That as he need not state his damages accurately he could not examine the said defendants in order to ascertain the value of the property they had induced him to part with. Butler v. Duke, 235.

2. *Examination, before issue joined, to frame a complaint — Minority stockholder's action against her directors for an accounting — Requisites of examination — Director's duty of disclosure.*— Affidavits of a minority stockholder of the American Tobacco Company, which allege that its directors have formed and control three analogous corporations as well as a subsequent consolidated company embracing all the corporations, that the directors have made agreements with themselves to divert the business of the American Tobacco Company to the other corporations and to the consolidated company, that they have made false reports as to the condition of the American Tobacco Company, that they have withheld from it dividends earned and have made for themselves and withheld from it large profits, show facts sufficient to entitle the minority stockholder to sue in her own name for an accounting by the directors of the profits and enable her to frame a complaint, and this being so, she cannot be permitted to examine them before issue joined for the purpose of framing a complaint. Her ignorance of the exact terms of the agreements under which the directors managed or are managing the other corporations affords no grounds for such an examination as she need not allege the agreements accurately nor more than their purport. The extent of her damage is not a proper subject for such an examination. To justify such an examination it should appear that the information sought is peculiarly within the knowledge of the defendants sought to be examined and is not accessible to the moving party in any other manner. The moving party does not meet this requirement where she has not even demanded the information she here seeks. A director of a corporation does not occupy such a fiduciary relation to a stockholder thereof as to require him, without compliance had with the rules governing such examinations, to disclose to her what he has done with the property of the corporation. Elmes v. Duke, 244.

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DEVISE.

When devisees do not take by survivorship as a class.— Where a testator devises his residuary estate to his sister and his two brothers, to be equally divided between them share and share alike, the share of a brother, who died before the testator, does not pass to the survivors as a class but lapses and goes to the testator's next of kin. Langley v. Westchester Trust Co., 735.

DISCOVERY.

Inspection.— Defendants should not be allowed a discovery and inspection of the plaintiff's books, in order to support their counterclaim, where they do not show that the books contain the entries they wish, and where, although asserting sources of information, they do not excuse their failure in not having obtained the information from the alleged informants. Russell & Co. v. McSwegan, 306.

DIVORCE.

Admission of erroneous evidence — Does not justify the Special Term in refusing judgment.— It is erroneous upon the trial of a wife's action for a divorce for the referee to refuse to permit the defendant specifically to deny the charges of adultery proven and for the referee to exclude evidence of other witnesses of the defendant tending to refute material allegations of the plaintiff's case. It is erroneous for the referee to admit evidence, upon the theory that it tended to show the intent with which the defendant visited a house of prostitution kept by the corespondent, tending to show that he had visited such a house kept by another woman and there committed adultery with her. Notwithstanding these material errors, the justice, sitting at Special Term, upon an application for judgment on the referee's report in favor of the wife, granted her judgment with costs and alimony, and this because he considered that, as the erroneous rulings constituted the only reason for denying judgment and as he could not under Code C. P., § 1229, review generally the report and set it aside and grant a new trial, the wife was entitled to judgment. Goldie v. Goldie, 389.

DOWER.

Defeated by the husband's deed before marriage — Delivery to a third person.—An owner of two lots separately conveyed one of them to each of his two sons, they actually paying the consideration of one dollar, and he in their presence handed the deeds to an attorney requesting him to hold them during the grantor's life, at his death record and deliver them to the grantees, the grantor during his life to receive the rents and profits. He subsequently married, thereafter died, and thereupon the attorney recorded the deeds and delivered them to the grantees. Held, that the title passed to the sons when the grantor delivered the deeds, in their behalf, to the attorney, and that therefore when the widow subsequently married the grantor there was in him no estate to which dower could attach. Yutte v. Yutte, 272.

EASEMENT.

See **City of New York; Injunction; Title.**

EJECTMENT.

Demurrer to complaint — Tax sale in New York city in 1883 *— Publication of notice of sale and of notice of redemption.*—Where a plaintiff elects to frame his complaint in ejectment so as to set out in detail the facts upon which his claim of title rests, the defendant may demur, for, unless the facts support the plaintiff's claim, his subsequent allegation of ownership, or of title, is merely an unwarranted conclusion of law. The Consolidation Act (L. 1882, ch. 410) did not operate to arrest proceedings then pending to sell property in the city of New York for non-payment of taxes nor did it take from the city comptroller the power to proceed to carry out the sale. A complaint, in ejectment, by one claiming under a sale of New York city property for unpaid taxes, conducted under L. 1871, ch. 381, first adver-

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EJECTMENT — Continued.
tised for March 5, 1883, and made on May 8, 1883, is demurrable where it fails to allege that the notice of the sale was published in the official journal established by L. 1871, ch. 574, and that notice to redeem therefrom was published by the clerk of arrears either in the City Record or in a specially authorized newspaper, as required by L. 1882, ch. 410, § 66. Ely v. Azoy, 669.

ELECTIONS.
Nomination by the committee of a political party of a candidate already nominated by a convention of another political party — Determination of the Secretary of State, as to the validity of the nomination, where reviewable. —The Election Law (L. 1896, ch. 909) regards a nomination made by a party committee as of equal dignity and originality with one made by a convention and, therefore, although the Democratic party has in convention nominated a candidate for a State office, the Secretary of State cannot lawfully refuse to file, as invalid, a certificate of the subsequent nomination of the same man for the office by the duly authorized committee of a convention of the Prohibition party to fill a vacancy left by its convention — there being no case for the application of that part of section 66 of said law which provides, in substance, that when no nomination shall have been originally made by a political party it shall not be lawful for any committee of such party, authorized to make nominations, to nominate or substitute the name of a candidate of another party for such office; it being the intention of the law, as therein stated, that when a candidate of one party is nominated and placed on the ticket of another party such nomination must be made at the time and in the manner provided for making original nominations by such party. Under section 56 of said law, a citizen and Prohibitionist voter who resides in the first judicial district may review there the adverse determination of the Secretary of State although he resides in the third judicial district. Matter of Gillespie v. McDonough, 147.

See **Office and Officer; Primary Election Law.**

EQUITY.
1. *Marshaling assets — Trustees when protected in payments made under a trust void because for the benefit of the donor — Subrogation — Estoppel — Academic question not discussed.*— Where a debtor expressly agrees that a particular creditor shall have a lien upon two funds, composed respectively of real and personal property, the equitable rule that a doubly secured creditor must be paid first from the fund upon which singly secured creditors have no lien does not apply and payment should be made the doubly secured creditor one-half from each fund; and particularly where other claims against the personalty — the fund upon which the singly secured creditors have no lien — would exhaust that fund. A deed or assignment, by which a failing debtor conveys all his property to trustees upon their simultaneous but separate agreement to convey back to him in fee upon request and in the meantime use the income and the proceeds of any sales to support him and his family and pay his debts, is void; but where the trustees subsequently raise money on their own notes and, in reliance upon the assignment, pay a percentage of his just debts, they are entitled to reimbursement therefor in preference to subsequent liens or claims and will be subrogated *pro tanto* to the rights, in funds representing his estate, of the creditors whose debts they paid. A creditor who, after accepting and retaining a dividend under such an assignment with knowledge of all the circumstances attending it and releasing the trustees, secretly procures from the assignor his notes, and security for the balance of the claim, cannot enforce a judgment, which he entered thereon upon confession, against funds representing the assignor's estate. Where a fund has been exhausted by the terms of a decision of the court in regard to its disposition, the court will not discuss the rights as between each other of other claimants to the fund — and this because the questions have become academic. New York Public Library v. Tilden, 169.

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EQUITY — Continued.

2. *Final distribution of a fund in court — Method — Rights of claimants — Notice of filing referee's report.*— At any time before final distribution of a fund in the hands of the receiver of an insolvent corporation, the court may, on such terms as may be just, permit a claimant of the fund to come in, be heard and enforce his rights. Where the Appellate Division has fixed a method for the distribution of the fund the Special Term should follow it. A creditor who has not appeared either in person or by attorney before a referee appointed to take and state the account of the receiver is not entitled to notice of the filing of the report of the referee. People v. American Loan & Trust Co., 647.

ESTOPPEL.

See **Equity; Partition.**

EVIDENCE.

1. *Oral evidence to vary a written instrument.*— Where a written agreement is complete in itself proof of an oral agreement made at the same time is inadmissible to vary it. Townsend v. Greenwich Ins. Co., 87.

2. *Party cannot contradict his own witness, also a party, where he is uncontradicted.*— A party calling a witness asserts his credibility and therefore where a defendant calls another defendant whose credibility, had he testified for the plaintiff, would have been for the jury, the defendant, calling the witness, is bound by his testimony where it is uncontradicted. Haas v. Zimmermann, 304.

3. *Action for a wrongful levy — Void chattel mortgage, or bill of sale — Mortgagor's independent transfer of possession.*— One Camman owned some horses and for a loan by the plaintiff executed to him an instrument, not filed as required by L. 1897, ch. 418, § 90, which was either a mortgage on or a bill of sale of the horses. Camman remained in possession of them. The sheriff, whose surety has been substituted herein, thereafter levied upon them and thereupon the plaintiff sued him. The plaintiff offered, but was not allowed, to prove that before the levy Camman had transferred the horses to him in payment of the loan. Held, that the evidence was admissible. That, while the plaintiff could not enforce the instrument and it was void as to Camman's judgment creditor, Camman had a right to make before levy an independent transfer of possession which, if *bona fide* and for value, would vest in the transferee a title superior to the rights of the said judgment creditor. McDonald v. City Trust Deposit & Surety Co., 552.

See **Boundaries; Contract; Criminal Law; Divorce; Witness.**

EXAMINATION BEFORE TRIAL.

See **Depositions.**

EXCISE.

See **Liquor Tax Law.**

EXECUTORS AND ADMINISTRATORS.

1. *Judicial settlement of account — Nature of an executor's claim against his testator as mortgagor — Not subject to collateral attack — Costs when denied contestant.*— Mortgages given an executor by a testator on property of which he died seized are not claims which the executor must establish upon the judicial settlement of his account by proof, nor are such mortgages assailable therein by objectors to the account upon the ground of fraud — or otherwise than by a direct equitable action between the parties. Where the account as settled shows that the estate owes the executor more than he has been surcharged as a result of a contest, the contestants should not have costs as they have not rendered the estate any material benefit. Matter of Eadie, 117.

2. *Judicial settlement — Executors' expenditures for their account not limited by Code C. P., §§ 2561, 2562.*— The amount which executors may lawfully

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EXECUTORS AND ADMINISTRATORS — Continued.

expend and be allowed for the services of counsel, upon the judicial settlement of their account, in preparing the same and for procuring it to be passed and settled is not limited by Code C. P., §§ 2561, 2562. Matter of Mitchell, 120.

3. *Expenses of administration.*— Traveling expenses cannot be allowed an executrix where they were not necessary to the performance of her duties as such. Matter of Biggars, 426.

4. *Executor's right of retainer.*— Where, upon a balance struck, an executor, and legatee, of an estate is found a debtor to it, the amount due him by it should be credited upon the debt in full satisfaction of his legacies and commissions. Matter of Warner, 432.

5. *Surrogate's Court — Accounting, as executor of one partner, of the survivor of three, the estate of the other not being represented — Payment made by an executor on his own property disallowed.*— The survivor of three partners when accounting as executor of one of them, cannot, where the estate of the other of them is not represented, be forced to an accounting of the partnership affairs for the purpose of charging him as executor with moneys in excess of those admitted by him in his account to be due from him as survivor. He may however be charged with amounts admitted by him to have been received by him as executor from himself as survivor. He cannot be allowed as executor water-meter charges which were a lien upon property of his testator at the time when the latter conveyed it to him, as the executor in paying these charges after the testator's death was, in effect, paying charges on his own property. Matter of Mertens, 512.

6. *Right of retainer — Delivery necessary to a gift.*— Administrators have a right to retain from distributive shares the amount of outlawed promissory notes of the distributees which they owed the intestate at the time of his death. His expressed intention to forgive the distributees their debts is ineffectual to constitute a gift where he never delivered to them the notes representing the debts. Matter of Timerson, 675.

7. *Delayed claims — Jurisdiction on the hearing of a disputed claim — Claim for a conversion.*— Claims withheld during the life of an alleged debtor and sought to be enforced after his death should always be scrutinized closely and be admitted only upon very satisfactory proof. Upon a reference of a disputed claim the surrogate has no power to render against a claimant, upon a counterclaim in favor of the estate, an affirmative judgment in excess of the counterclaim. Before the estate of a widow, since deceased, given by her husband's will the right to use his estate to support herself and his sisters, can be charged with moneys of that estate which it is alleged that she converted or misappropriated, the fact of the conversion or misappropriation must be affirmatively shown. Matter of Wilmot, 686.

8. *Surrogate's lack of jurisdiction to confirm a contract of administrators for turning their intestate's business over to a foreign corporation and taking stock in it for his interest — Code C. P.*, § 2719.— That part of Code C. P., § 2719, which declares that a surrogate may authorize an executor or administrator to compromise a claim gives the surrogate no jurisdiction to permit and approve a contract, made between administrators and one who claims to have been an equal partner with their intestate in a business, by the terms of which the administrators are to assign all their intestate's interest in the business to a corporation to be created under the laws of another State, accept in payment a part of that stock, and permit the alleged surviving partner to take the rest of it. Administrators sell on their own responsibility and if they sell for anything except cash ordinarily they take the risk. Matter of Gilman, 762.

See **Decedents' Estates; Interest; Judgment; Jurisdiction; Surrogate's Court; Will.**

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FALSE IMPRISONMENT.

Complaint — Action for a "wrongful arrest".— General allegations that the defendant wrongfully and unlawfully caused the plaintiff to be imprisoned and detained for two days upon a false charge of grand larceny, to her damage, do not, where it appears that the public authorities arrested and imprisoned her after a charge made, state a cause of action, as the arrest and imprisonment must be presumed to have been legal and there is no statement of facts tending to show that they were caused by illegal means. Assuming that there is such an action as one for a "wrongful arrest", as distinghished from false imprisonment, a complaint therefor is demurrable where it fails to allege detention and damage. Pease v. Freiwald, 549.

FORBEARANCE.

See **Consideration.**

FORECLOSURE.

Right to redeem when terminated not set aside for inadequacy of price alone. — The right to redeem, from a sale fairly made in an action of foreclosure and made to a stranger, is terminated by the sale itself and not by the referee's deed to the purchaser. Barnard v. Jersey, 212.

See **Consideration; Judicial Sale.**

FRAUD.

Must be pleaded.— Fraud cannot be predicated on a mere promissory statement inducing the making of an agreement where its terms are understood. Townsend v. Greenwich Ins. Co., 87.

See **Creditor's Action.**

GAMING.

See **Criminal Law.**

GIFT.

See **Savings Banks; Will.**

HABEAS CORPUS.

Prostitution in a tenement house — Negligible error in the commitment — Release from detention under L. 1901, *ch.* 466, § 710.— A commitment of a woman to the workhouse on Blackwell's Island as a vagrant, for having committed prostitution in a tenement house in the city of New York, is not invalidated by an erroneous recital therein that she was committed under a certain title and section of the city charter when the same section and title of the Tenement House Act should have been named instead. *Semble*, that where such a vagrant claims, upon the hearing of a writ of habeas corpus taken out by her, that she is being illegally detained because entitled to the benefit of that provision of the charter (L. 1901, ch. 466, § 710), which requires the city commissioner of corrections, within three days after her commitment, to ascertain from the records whether, within two years, she has been guilty of public intoxication, disorderly conduct or vagrancy, and, if it is her first offense, discharge her in five days, she must, in order to raise that question, traverse the return to the writ by alleging a state of facts warranting her discharge under said section. People ex rel. Craige v. Fox, 591.

HARLEM RIVER.

See **City of New York.**

INCOMPETENT PERSONS.

See **Lunatics.**

INFANTS.

See **Costs.**

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INJUNCTION.

1. *Refused, in a common law action for money only, against a fraudulent transferee of the vendee — Effect of L.* 1902, *ch.* 528, § 1 — *Code C. P.*, § 603 — *Receiver.*— In a common law action brought by a general creditor to recover a sum of money only, he cannot, upon allegations that his defendant debtor fraudulently disposed of his merchandise in bulk to the other defendant with a view to hinder, delay and defraud the debtor's creditors, that that defendant purchased with a like intent, and that the debtor has left the State of New York and cannot be found, procure under Code C. P., § 603, a continuance of a temporary injunction restraining the said transferee from disposing of the property transferred, as that section of the Code applies only to equitable actions or to actions triable by the court. He is not entitled to a receiver of said property. The procedure in such a matter has not been changed by L. 1902, ch. 528, § 1, making fraudulent and void as against creditors of the seller sales of merchandise made by him in bulk. Veit v. Collins, 39.

2. *Partnership — Continuance of an injunction, to prevent a firm execution creditor from continuing the business, when refused one partner — Receiver.*— Where the preponderance of evidence tended to show that the firm of Green & Tuchner was indebted to one Weitzman for mony loaned it, that he recovered judgment in another court against the firm without service of the summons upon Green, that when Weitzman attempted to sell on execution Green resisted and obtained leave to defend that action, that Green agreed to the sale provided the proceeds be paid into court to abide the event of that action, and that Weitzman purchased most of the stock at the sale and employed Tuchner, a practical worker in that kind of business, to continue it in Weitzman's name and interest, the Supreme Court refused to allow Green further to restrain Weitzman (and Tuchner) from interfering with or carrying on the business and also refused to appoint a receiver thereof. Green v. Tuchner, 154.

3. *Lease — Right of tenant to easements of light and air in the rear yard of her landlord — Mandatory injunction — Tenant's right thereto saved by her timely objections and notice to landlord that she intends to sue him.*— A person in occupation of second-story premises whose rear abuts upon a yard is entitled to an easement of light and air therein, and, where, after and while the relation of landlord and tenant has arisen and is existing between the parties, the landlord builds in the yard a three-story extension of the premises, having the effect of cutting off light and air from the rear windows of the demise of the tenant, he will at her suit be directed by a mandatory injunction to remove so much of the extension as is higher than her windows. Where she has promptly objected to his acts and notified him of her intention to sue him, the fact that he succeeded in completing the extension before an injunction order in the action was served upon him cannot avail him. Stevens v. Salomon, 159.

4. *If dependent on the nature of the action, the plaintiff cannot change the ground he took in his complaint and affidavits — Code C. P.*, § 603.— Where the right to a temporary injunction depends on the nature of the action the plaintiff must rest upon his complaint and its supporting affidavits, and the issues of the motion are limited to those raised by these papers and by the answering affidavits. Accordingly, where the gravamen of the complaint is that the defendant, the adjoining proprietor, is trespassing on the building of the plaintiff by cutting away its stoop, he cannot, when beaten on that issue upon the return of an order to show cause why a temporary injunction should not issue, change his ground and set up by replying affidavits a new grievance — in that the defendant's same acts are destroying an alleged easement which the encroaching stoop of the plaintiff has in and over the defendant's lot. Le Roy v. Chesebrough, 285.

5. *Refused an abutting owner to restrain pendente lite the construction in Park ave., New York city, of the rapid transit tunnel — Curable illegality — Indemnity.*— Although the New York city rapid transit tunnel in Park avenue, between 34th and 42d streets, is unlawfully constructed to the extent that it is

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INJUNCTION — Continued.

located twenty-eight feet too far to the east, the Supreme Court, in view of the imperative necessity for rapid transit in the city, will not temporarily enjoin its construction upon the ground that it is a public nuisance, cause it to be filled solid and have a new tunnel constructed in the avenue farther west in the proper location at a probable expense of $700,000 and causing great delay, merely because drilling and blasting have diminished an abutting owner's peaceful enjoyment of his property and its easements and the prospective operation of the road may threaten permanent injury to his property, it appearing that the foundations of his dwelling have not been affected, that the annoyance to him from drilling and blasting will not be much in excess of what it would have been had the tunnel been built as located on the plans adopted, that drilling and blasting are nearly concluded, and that this particular section of the tunnel soon will be and necessarily must be soon completed. Where the illegality arising out of the tunnel's having been constructed too far to the east is curable by action in the courts and such action has been initiated, the court will give this point consideration in determining whether it will grant a preliminary injunction. The owner is, however, entitled to a bond indemnifying him against all possible loss. Barney v. City of New York, 719.

See **Labor; Stock.**

INSPECTION.

See **Discovery.**

INSURANCE (FIRE).

Written agreement of all parties to appraise a loss not assailable by the owners in a common law action on the policies —Fraud or mistake must be pleaded — Rescission and restoration.—A written agreement to appraise a loss on mortgaged premises, payable to the mortgagee, executed by the owners, the mortgagee and the insurers, and followed by an award thereunder and payment thereof, cannot be varied by oral evidence that to induce the insured to enter into the same the agent of the insurers orally promisd or agreed that, notwithstanding its terms, the arbitrators should not follow the same but should award at least $6,000, and only consider whether they should award more. A common-law action to recover on a policy of insurance cannot be maintained where an award has been made and paid unless the plaintiffs first rescind and restore; and although the award was paid to the mortgagee the insured owners must still restore it where it was paid for their benefit and under the terms of the policies. Townsend v. Greenwich Ins. Co., 87.

INSURANCE (LLOYDS).

Underwriter's answer of payment — An answer should set up material facts which occurred after action begun and before answer.— Where a Lloyds insurance policy makes the liability of an underwriter individual and separate and limits its amount to a specific sum, it is a defense to an action brought to recover an alleged loss under the policy and brought upon an allegation that a judgment, by agreement establishing the amount of the liability of the defendant as underwriter, has been recovered against him as general manager and as attorney in fact for all the underwriters, for the defendant to allege that he has already been compelled to make payments, on other policies of the said Lloyds, which exceed his liability as stipulated and fixed by the policy in suit. Where the said judgment, establishing the amount of the said liability, has on appeal been modified and reduced since the commencement of the present action and before answer therein, the defendant may in his answer set up the modification as a partial defense to the present action and need not, in view of Code C. P., § 544, set it up by a subsequent and supplemental answer. Burke v. Rhoads, 208.

INSURANCE (LIFE).

See **Transfer Tax.**

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INTEREST.

When the estate of a testator and his legatees stand to each other as creditor and debtors — Executor's right of retainer — Loans of estate moneys made by an executor to himself as an individual.— The third clause of the will of a testator gave his residuary estate to his children and grandchildren. The fourth clause directed that, if within ten years of his death, any of them died without issue living then the survivors should take the share or shares. The fifth clause directed that "all moneys with interest due me at my decease" from the (his) residuary legatees should be included as a part of his personalty, whether or not the debt were outlawed, and that each and every debt which the said legatees "may owe me at my decease with interest shall be treated and reckoned in as so much had and received on account of the provision I have made herein for them and each of them". Held, that a grandson who had lived for more than ten years after the death of the testator and, who at the latter's death owed him money secured by notes, must pay thereon simple interest from the dates of the notes to that of the testator's death, and that the executors, in settling with the grandson, might retain and set off against his share so much of the principal and simple interest as remained unpaid at the time of the settlement. An executor of an estate, who borrows its moneys and repays them, is chargeable on the loans with five, and not with six, per cent. interest. Matter of Downs, 621.

INVENTORY.

See **Surrogate's Court.**

JUDGMENT.

1. *Measure of assignee's damages where the assignor wrongfully satisfies it and for less than its face — Insolvency of judgment debtor.*— Where an assignee of a judgment sues his assignor for breach of his assignment covenant not to collect or receive the judgment or any part thereof nor release or discharge it, and the proof is that the assignee paid the assignor for the judgment its face value and that the assignor, the assignment not having been recorded, thereafter satisfied it for one-fifth of its face, the assignee may recover the face value of the judgment where the assignor although pleading insolvency of the judgment debtor does not show that it continued down to the time of the commencement of the action for the breach. Hohle v. Randrup, 334.

2. *Action to compel its extinguishment — Abuse of confidential relation.*— Where the attorney for an estate acts at the same time, for a fee, for purchasers of a judgment against the estate one of whom, the instigator of the purchase, occupied the same office and was associated in law business with him, with the result, that the judgment, although considered by all parties enforcible at its face, was purchased at a discount, the administrators of the estate are entitled to have it satisfied upon repaying the sum paid for it with four per cent. interest. Hare v. De Young, 366.

See **Statute of Limitations.**

JUDICIAL SALE.

Not set aside for inadequacy of price alone.— A judicial sale will not be set aside for inadequacy of price alone. Barnard v. Jersey, 212.

See **Foreclosure.**

JURISDICTION.

1. *Not conferred on a surrogate by a waiver of the issue of a citation, executed before any proceeding had been taken.*— Where a proposed judicial settlement of the accounts of executors had not been commenced either actually or constructively at the time when a person who would be a necessary party to such a proceeding duly executed a waiver of the issue and service of a citation therein and also consented to a decree of settlement, the surrogate held that no jurisdiction over the said party was thereby acquired or conferred. Matter of Graham, 226.

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JURISDICTION — Continued.

2. *Of an illegally expelled member's action for reinstatement in his benefit order — Meaning of a "decision of the order."*— The Supreme Court has jurisdiction of an action to reinstate in a subordinate lodge of a benefit order a member expelled therefrom without notice or hearing, although the constitution of the order provides that any member "who deems himself aggrieved by a decision of the order is within three months entitled to appeal to the grand committee", and this because such an illegal expulsion is not to be deemed or dignified as a "decision". Kohler v. Klein, 353.

3. *Of an action requiring executors to account — Rule in Second Judicial Department.*— In the Second Judicial Department, the court of the surrogate and the Supreme Court are deemed to have equal jurisdiction of an action requiring executors of personalty to account, and the latter court cannot lawfully refuse to take or retain jurisdiction of such an action unless there is interposed, in bar thereof, a plea that a proceeding is pending in the former court involving the same subject matter. Haughian v. Conlon, 584.

JUSTICE'S COURT.
See **New Trial.**

LABOR.
Labor union — Legality of picketing a store — Motive — Conspiracy — Acts restrained — Use of verified complaint on a motion for an injunction.— Acts, of sympathizers with labor unions, consisting in picketing a store declared "unfair" by the unions, circulating near it printed cards asking union men to keep away from it, and endeavoring to keep them and the public away by persuasion and peaceable means only, are not illegal and the further commission of such acts will not be enjoined at the suit of the proprietors of the store. The motive with which the sympathizers did these acts is not material nor are the acts made illegal by the fact that a number of persons cooperated in them by agreement. The court however enjoined so many of the defendants, as had been served with an order to show cause why a temporary injunction should not be granted, their servants, agents, coadjutors and assistants, from entering the store for the purpose of interfering with trade or customers, from interfering, from obstructing access to it by any physical means, from so acting as to collect in front or adjacent to it crowds calculated to obstruct travel upon the streets or sidewalks near it, and from using threats, violence or intimidation with the intent of preventing travelers or intending customers from entering the store and trading there. Where a verified complaint, instead of an affidavit, is used on a motion for an injunction, there can be taken to be true only positive allegations therein and those made on information and belief where the sources of the information and the grounds of the belief are given. Foster v. Retail Clerk's International Protective Assn., 48.

LABOR UNIONS.
See **Labor.**

LANDLORD AND TENANT.
See **Injunction; Lease; Summary Proceedings.**

LEASE.
1. *When a surrender does not prejudice a subtenant.*— Where a tenant, having a right so to do, sublets the basement of the demised premises and thereafter, before expiration of the term of either lease, surrenders his own to one claiming, but not shown, to be the grantee of the original lessor, the surrender does not affect the vested right of the subtenant to continue to occupy the basement during his entire term. Oshinsky v. Greenberg, 342.

2. *Test of liquidated damages.*— Where a theatre lease, involving a yearly rent of $22,500 and permitting a renewal, expressly provides for a tenants' deposit of $5,000, and for its forfeiture, upon a tenants' breach, and describes

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LEASE — Continued.

it as the sum agreed upon "as liquidated damages that the said party of the first part (the landlords) is entitled to have and receive without set-off or counterclaim", the landlords are, after duly dispossessing the tenants for a breach, entitled to retain the deposit as liquidated damages, and this because it is clearly designated as such, damages for the breach are not definitely ascertainable, and $5,000 is not an unconscionable measure for the damages sustained by the landlords. Adler v. Kramer, 642.

See **Summary Proceedings.**

LEGACY.

1. *Ademption or satisfaction by portion or advancement.*— Whenever a parent gives a legacy to a child without stating any particular object for which it is given the legacy is to be deemed a portion. If the parent afterwards in her lifetime makes a settlement upon the child by way of a portion or pays him a sum of money by way thereof or makes an advancement to him or gives him a sum of money as an advancement, such payment, portion or advancement amounts to a satisfaction — or, as is often said, an ademption of the legacy, either *pro tanto* or in full, as the money thus paid or settled is less than, equal to, or greater than the legacy. Matter of Weiss, 71.

2. *When demonstrative — Abatement — Executors' right of retainer.*— Legacies of thirds, after payment of the expense of a monument to the husband of the testatrix, in "the four thousand dollars advance (profit) which I made from the sale of my property to J. W. Collins", are demonstrative, but, where no identified fund for their payment existed at the death of the testatrix, the legacies must share and abate *pro rata* with the general legacies of the will. Matter of Warner, 432.

See **Will.**

LIEN.

1. *Code C. P., § 66 — Defendant's attorney can have none unless he interposes a counterclaim — Effect on a complaint of a demurrer to the answer — Lien not enforcible in equity.*— An attorney, for a defendant who succeeded in an action in which a temporary injunction had been granted against him, cannot acquire under Code C. P., § 66, any lien in the action where the answer he served therein contained no counterclaim, and hence where he thereafter seeks to assert in equity such a lien against his client and against a surety, for the adversary, which became liable in damages to the client when the injunction was vacated, the attorney's demurrer to their answer must result in the dismissal of his complaint, and this under the rule that such a demurrer searches the whole record for the first fault in pleading defective in substance. An equitable action will not lie to enforce a lien under said section. Fromme v. Union Surety & Guaranty Co., 105.

2. *Of a boarding-house keeper does not attach to property of a third person brought on the premises by a boarder.*— The lien of a keeper of a boarding-house, as now existing, is established by the Lien Law (L. 1897, ch. 418, § 71, as amd. L. 1899, ch. 380), a new enactment, and said section 71 gives such keeper no lien on property brought upon her premises by a boarder nor any right to detain it for board, etc., where the legal rights to both the title and possession of the property were then in another — and this because the true owner cannot under the Constitution be divested of his property except by due process of law. Barnett v. Walker, 323.

LIQUOR TAX LAW.

1. *Cancellation of bond when enforcible.*— The liability of a surety upon a bond given under the Liquor Tax Law continues until the Statute of Limitations has barred any action upon the bond, and until then the principal cannot procure a cancellation thereof and a return of his deposit therefor where the surety resists it. Shea v. Fidelity & Casualty Co., 107.

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LIQUOR TAX LAW — Continued.

2. *Complaint — Statutory exceptions as to the sale of liquors in prohibited hours need not be negatived.*— A verdict rendered in his favor, in an action brought by the State Commissioner of Excise against a so-called club for selling liquors between one and five a. m., in violation of L. 1896, ch. 112, § 31b, will not be set aside merely because the complaint did not negative the subsequent provision, near the end of said section, excepting from said subdivision b a corporation or association organized when and as therein prescribed. Cullinan v. Criterion Club, 270.

3. *Revocation of certificate — Jurisdiction when obtained — Proof and trial — Limiting issues.*— The court gets jurisdiction of the parties to and the subject matter of a proceeding, taken under the Liquor Tax Law (L. 1896, ch. 112, § 28, subd. 2), to revoke a certificate, upon service of the petition and order to show cause, and this although the petition be on information and belief. In any and every case, however, a violation of the statute must be established by legal proof before the certificate can be cancelled. The court will not limit the trial of the charges, contained in a petition such as the above, to those supported by a probative affidavit, merely because the holder of the certificate denies some of the charges and fails to deny others, and for the reason that he may succeed on charges which he denied and yet forfeit his certificate if sufficient proof is made of charges which stand undenied. Matter of Cullinan, 354.

4. *How long the liability of a surety upon the bond of a certificate holder continues.*— Where business is ostensibly being carried on under a liquor tax certificate and it has not been duly transferred or surrendered, a surety company, which has covenanted that the certificate holder will not, while the business for which the certificate is given shall be carried on, suffer or permit any gambling to be done in the place designated by the certificate or suffer or permit the premises to become disorderly, is liable upon its bond if violations occur in the place, and this although the holder of the certificate has parted with his interest in the business and no longer has any control over it. Cullinan v. Parker, 446.

5. *Discontinuance of a proceeding to revoke a certificate.*— The Supreme Court may for sufficient cause order a discontinuance of a proceeding taken to revoke a liquor tax certificate where the application is made by the party who instituted the proceeding, but it cannot order a discontinuance on the application of the holder of the certificate, the commissioner of excise opposing. Matter of Cullinan, 558.

6. *Illegal sales by a bartender.*— It is not a defense, to a proceeding to revoke a liquor tax certificate on the ground of illegal sales, for the holder to allege that her bartender made the sales contrary to her express injunction and this because the Liquor Tax Law makes her liable for all violations of it committed by her bartender. Matter of Cullinan, 636.

7. *Consent of the holder of a certificate to its use by another — Revocation.* — Where violations of the Liquor Tax Law occur in a place ostensibly conducted under an outstanding liquor tax certificate and the person in charge is using it with the consent of the holder thereof, the statute holds the latter responsible for the violations and for the costs imposed upon a revocation of the certificate. *Semble*, that so long as the certificate remains in the name of the holder he will be liable for violations occurring in the place, whether or not he has consented to the use there of his certificate. Matter of Cullinan, 641.

8. *False statement that a building, to be used as a hotel, complied with the statute.*— A statement, of a person desirous of becoming a transferee of a liquor tax certificate and intending to conduct a hotel, made in his applica-

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LIQUOR TAX LAW — Continued.

tion to the effect that the building in which he is to carry on his hotel complied with the statutory requirements in regard to a hotel, is material and irrevocable. Where the answer of the proposed transferee fails to deny the excise commissioner's allegation that the building did not comply with the statute there is no material issue before the court and it will, without a reference and upon proof of mere formal matters, revoke the certificate. Matter of Cullinan, 646.

9. *"Hotel"— Changes in the building — Abandonment — Innocent and immaterial statement as to continuous occupation.*— A place, kept open for entertaining strangers or travelers and which receives all who come to it, without any previous agreement as to length of stay or terms of entertainment, is a "hotel" within the Liquor Tax Law. To be a "hotel" it need not keep a safe for valuables or have a register for guests or provide stable accommodations. The fact that it displays a sign "Boarding house" is not controlling as to its character. A building occupied exclusively as a hotel on March 23, 1896, does not lose its privilege or change its identity merely because after said date the location, in it, of the barroom has been changed. A hotel cannot be deemed to have been "continuously occupied" as such since March 23, 1896, where it appears that since that date a considerable portion of it has at various times been rented to tenants and used for other purposes. A liquor tax certificate cannot lawfully be revoked merely because a person, applying for it for premises which were occupied exclusively as a hotel on March 23, 1896, innocently and in good faith made in his application the misstatement that the premises had since been continuously occupied as a hotel. Such a statement is, in such case, not material or necessary. Matter of Brewster, 689.

10. *Bedrooms of a hotel too small — Dwelling erected to defeat the granting of a certificate.*— A liquor tax certificate, for a hotel, must be revoked where it appears that at the time when the holder applied for the certificate some of the bedrooms of his hotel did not comply with the requirements of the Liquor Tax Law in regard to floor area and cubic feet of space and were of less area and space than required by the statute. A small house, erected with intent to defeat the granting of a liquor tax certificate but rented and occupied by a man and his wife as a home, is a building "occupied exclusively for a dwelling" within the meaning of the statute, and, where the house is within two hundred feet of the hotel, the licensee's statement, in his application, that there is no dwelling within two hundred feet of the hotel is material and is false. Matter of Ryon, 698.

LUNATICS.

Incompetent person — Allowance made to her committee for successfully resisting attempts to procure her freedom.— Where a woman, adjudged an incompetent, applies to the court for the discharge of the committee of her person and that she be restored to personal liberty of action, and this upon the ground that she has completely recovered her mental health, and the court thereupon orders her committee to show cause why she should not have such relief, and a decision adverse to her is reached both in the proceeding taken for the discharge of her committee and in a subsequent proceeding taken in another judicial department by habeas corpus, the committee of her person is entitled to be allowed out of her property reasonable disbursements and counsel fees, which he paid or incurred, in both proceedings. Matter of Larner, 377.

MANDAMUS.

See **Taxes.**

MARSHALING OF ASSETS.

See **Equity.**

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MASTER AND SERVANT.

Wrongful discharge — When the reasonableness of a rule of the master is a question of law only.— Where an employer defends his employee's action for an alleged wrongful discharge by answering that he had disobeyed orders, the court alone must decide whether it was reasonable for the employer to make a rule, for violation of which the employee was discharged, forbidding any smoking of cigars or cigarettes in a part of the employer's factory where inflammable substances were in constant use. Upon such facts the submission of this question to the jury is an error requiring a reversal of a judgment which the employee had recovered. *Semble*, that such a rule of the employer is reasonable. Honigstein v. Hollingsworth, 314.

MECHANIC'S LIEN.

1. *Indulgence in the time of payment — Filing a lien for a monument — Effect of debtor's bankruptcy prior to filing.*— A letter, written on Feb. 16, 1901, by creditors to a debtor in straightened circumstances in regard to a debt for a monument placed by them in a cemetery under a contract with him completed and payable as to the price on Nov. 1, 1900, in which the creditors say that they are willing to meet the debtor half way in the matter of the debt, that, if the latter is willing to pay interest from Nov. 1, 1900, and the principal with interest as soon as possible, the creditors will be willing to wait a reasonable time for the debtor to get his affairs straightened out, does not extend the time of the payment of the debt beyond Nov. 1, 1900, where the debtor accepts the proposition. Therefore, where the creditors do not file their lien, for the price of the monument remaining unpaid, under L. 1898, ch. 418, § 40, until more than a year after Nov. 1, 1900, nor until Dec. 6, 1901, the lien is void under section 41 of said statute. Where the debtor is adjudged a bankrupt on Nov. 22, 1901, the lien filed Dec. 6, 1901, entitles the creditors to no greater rights in his estate as a bankrupt than those of an unsecured creditor. Lazzari v. Havens, 255.

2. *Demurrer to the complaint upon the ground that another action is pending — Code C. P.*, § 488, *subd.* 4.— In view of the fact that a mechanic's lienor may assert his lien and at the same time sue for the debt it represents, a complaint for a money judgment for a bonded lien and to establish it against the surety is not demurrable merely because it alleges that, prior to the commencement of the present action, the plaintiff had commenced another, still undetermined, against the same defendant to recover the indebtedness set forth in the complaint, remaining uncollected, and this because the other action may have been one to recover the debt which was the foundation of the lien. Power v. Onward Construction Co., 707.

See **Actions.**

MERGER.

Parties.— Merger is a question of intention and none will be presumed or declared where the parties intended none. To effect a merger the estates must unite in the same legal person and he must hold them in the same light. New York Public Library v. Tilden, 169.

MISDEMEANOR.

See **City of New York.**

MORTGAGE.

See **Attachment.**

MOTIONS AND ORDERS.

1. *Crimes — Denial of a motion, addressed to the discretion of the court, to dismiss before trial an indictment against a public officer.*— A motion, to dismiss an indictment of a captain of the police force of the city of New York for willful neglect of duty made before trial and addressed to the discretion of the court, will not be granted where the court cannot say as matter of law that the evidence is insufficient to justify the grand jury in

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MOTIONS AND ORDERS — Continued.

finding the indictment and where it also appears that a general suspicion of police officials exists in the community. People v. Foody, 142.

2. *Order to show cause.*— An order to show cause takes the place of a notice of motion and can be substituted therefor only when and as authorized by Code C. P., § 780, and General Rules of Practice, No. 37. Stryker v. Churchill, 578.

MUNICIPAL CORPORATIONS.

1. *Plan of the work not permitted to prejudice a city's rights under an unambiguous written contract for the work.*— Contractors who, after examining the location of a proposed sewer, accept the work under a written contract with a city which provides that they are to prosecute the work at and from as many different points and at such times as the city officials may determine, and keep the work at all times and at their own expense entirely free from water, cannot, after completion and payment, recover of the city for extra work upon the contention that they relied upon its plan of the work as a part of the contract, that this plan falsely indicated another sewer as then existing, that they had a right and intended to commence the work at a certain point on the plan, and that, if the other sewer indicated thereon as existing had in fact existed, they could have drained by gravity into that sewer from their own and so have saved the cost to them of pumping is particularly objectionable where the city charter requires the expenses of its construction. Cunningham v. City of New York, 197.

2. *Front-foot rule of assessment — Consents of abutting owners as a charter condition precedent to a municipal improvement.*— The front-foot rule of levying assessments for benefit from a street pavement should not be adopted by a city and cannot be sustained where the rule results in assessing suburban property, occupied mainly as a wood-yard, at a rate about twenty-four times greater than a business block in the heart of the city, and such a result is particularly objectionable where the city charter requires the expense of local improvements to be "assessed on each piece of property apportioned as equitably as may be." Where the city charter forbids the common council from laying gas, or water, mains or pipes without first obtaining and filing with the city clerk the consents of at least one-half of the owners of abutting property, the assessment of an owner for connecting his property with such mains or pipes, where the same have been laid without compliance with the above provision, is illegal. Donovan v. City of Oswego, 291.

3. *Cities of the first and second class — Sale therein of short-weight coal.*— Where coal dealers of a city of the first or second class are sued for the penalty, imposed by L. 1900, ch. 327, § 150, for selling less than 2,000 pounds by weight to a ton of coal, and the plaintiff proves that the coal in question weighed only 1,870 pounds at a public scale, they can only meet such proof by showing that the coal when it left their yard weighed 2,000 pounds, and where they fail to do so it is erroneous to dismiss the complaint. City of New York v. Henderson, 351.

See **Boundaries.**

MUNICIPAL COURT OF NEW YORK.

Order opening a default.— An order opening a plaintiff's default in the Municipal Court of the city of New York may lawfully provide that the case be set down for trial upon a day certain. Horowitz v. Fuchs, 344.

See **Appeal; Principal and Surety.**

NEGLIGENCE.

1. *A child's dress set on fire while she was poking with a stick in hot ashes properly left in its vacant lot by a company — Active vigilance not required of it.*— A child nine years old whose dress was set on fire while she was poking with a stick in some hot ashes of chips and shavings, seeking for pieces of

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NEGLIGENCE — Continued.

brass, cannot recover damages, for injuries thereby sustained, of a company whose employee lighted the fire in its vacant lot in the proper conduct of its business and this because the company owed her no duty requiring it to exercise active vigilance to prevent such an accident. Coleman v. Robert Graves Co., 85.

2. *Domestic corporation when not bound to take notice of a foreign law.*— A domestic trust company, performing a domestic trust agreement, making it the depositary of the stock of four railroads, about to be consolidated, and charging it with the duty of issuing new stock to the holders of the original stock, is not, without actual knowledge thereof, chargeable with knowledge of a foreign law — different from our own — providing that no sale, assignment, or transfer of the stock of a railroad corporation should affect the rights of an attaching creditor until recorded on the books of the corporation or until a new certificate is issued to the person to whom the stock has been transferred, and, therefore, where, in the foreign State, a creditor of a depositor of foreign stock is enabled to attach and sell it because the trust company has not had it transferred to itself, no negligence is imputable to the trust company. New Jersey Construction Co. v. Farmers' Loan & Trust Co., 672.

See **Witness.**

NEGOTIABLE INSTRUMENTS.

1. *Action to compel issue of a new certificate of deposit for one lost — Non-negotiable instrument — Security not requirable of plaintiff under Code C. P.*, § 1917 — *Payment to depositor protected by Code C. P.*, § 1909.— Code C. P., § 1917, does not apply to an action brought against a security and trust company by a person who held, but has lost or inadvertently destroyed, a certificate or receipt by which the company promised to pay her "or her assigns" a named sum of money, and who seeks by her action to compel issue to her of a new certificate. Such a certificate is not a negotiable instrument within L. 1897, ch. 612, § 20. Code C. P., § 1909, would protect the company in paying her the money even if she had assigned the certificate, assuming the company to have had no notice of the assignment. Zander v. New York Security & Trust Co., 98.

2. *Holder in due course — Delay in negotiating — Usage.*— A domestic check, payable to the order of the payees, first transferred by them to a person who took it in good faith for value and without notice of dishonor, may be enforced against the maker by a bank which took it from him in due course, and defences (other than certain defences of fraud) which the maker had against the payees are cut off. Where the payees, who lived in Kansas, received the check, dated June 1, on that or the next day and in the State of New York, and the maker stopped its payment on June 4 because of an alleged breach of warranty of the chattels for which the check was given, and so notified the payees, and they then sent the check from New York city to be cashed to Kansas to one Hoffman, a resident there, a neighbor and the president, of the plaintiff bank, who had for years cashed their paper, and he received it and deposited it with the plaintiff on June 8, the court considered that none of these facts and delays constituted such an express or implied notice of dishonor to Hoffman or to the plaintiff as to let in against it defences which the maker had against the payees. A question put to a local bank president "Is there any custom or usage as to the length of time within which a check can be negotiated or will be accepted in negotiation, reasonable length of time after its issue?" is improper — where the check was first accepted in Kansas by the plaintiff — as apparently calling for a local instead of a general custom, and is also objectionable because it attempts to fix, by the witness, a "reasonable length of time" when that was for the court to find from the facts, including any established general usage. Citizens' State Bank v. Cowles, 571.

See Payment.

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NEW TRIAL.

Justice's court — Justice communicating with the jury after they had retired.— A new trial should not be granted, in an action in justice's court in which the defendant succeeded, merely because the justice, while the jury were deliberating in his courtroom and after the counsel in the case and the defendant had gone home, returned to the courtroom at the request of the jury and there read them his minutes of the testimony of two witnesses, and the further fact that he by an oversight did not, as he might have done, request the plaintiff to accompany him to the courtroom is not material under the circumstances. Welker v. Allen, 523.

See **Appeal.**

NEW YORK CITY.

See **City of New York.**

NUISANCE.

Action for a death from an explosion of chemicals resulting from a fire — Proximate cause where there are several independent defendants.—Where an administratrix sues in one action two independent firms for causing the death of her intestate as alleged by the maintenance of a nuisance consisting in the storage in a city of chlorate of potash, sulphur, nitrates of strontia and barium, which a fire exploded, and the proof on the trial is that the two firms and another firm not made a party to the action were occupants of a seven-story building, that they stored their property on various floors not indicated separately as to each firm by the proof, that all stored chlorate of potash — a substance which the jury might have found to be an "explosive compound" and forbidden by the charter to be stored within the city except under certain restrictions as to place and quantity — that a fire occurred in the building and that a quarter of an hour later there were three successive explosions, she cannot recover at all, whether or not the storage was unlawful, where she makes no proof as to the order, in time, in which the goods of the several firms exploded, nor any proof that the goods of either of the defendant firms were the proximate cause of or contributed to the death of her intestate, or how he came to his death. Schuck v. Main, 252.

OFFICE AND OFFICER.

1. *The failure of one, elected a town clerk, to take and file his oath of office in time does not create a vacancy in the office where it has not already been forfeited by judicial action.*— The provisions of the Town Law (L. 1890, ch. 569, § 51), relative to the times within which one elected a town clerk must take the constitutional oath of office and file it in the office of the town clerk, are directory merely. Where he makes and files such an oath before his term begins and before the office has been declared forfeited by judicial action no vacancy exists and the town board cannot appoint. Upon the same principle his failure to file in time a verified statement of his election expenses cannot *ipso facto* create a vacancy. Matter of Drury, 288.

2. *De facto incumbent entitled to the salary.*— A police captain of the city of New York, duly appointed from the eligible list of sergeants as certified by the city civil service commission, carried on the rolls of the department as captain and recognized and paid by it as such for fifteen months, may compel the said commission and the city police commissioner to certify him on the monthly pay-rolls of the department as captain and entitled to salary as such. The contention, that the police commissioners who appointed the captain falsely certified, in his favor, to the said civil service commission, his record on the police force and thereby obtained for him too high a place on the eligible list, goes only to the tenure of his office; and, assuming that he can be ousted therefrom at all, he is entitled to his salary until ousted by an action brought by the attorney-general. Matter of Toole v. Ogden, 581.

See **Constitutional Law.**

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PARTIES.

1. *Leave to a stockholder to intervene in an action against his corporation — Discretionary where the receiver is defending — New issues not to be interjected by an intervenor.*— It is discretionary with the court whether it will permit a stockholder and creditor of a corporation to intervene in an action against it which is being defended by its receiver; and usually such leave will be refused unless it is shown affirmatively that the receiver has acted fraudulently, collusively, or manifestly to the detriment of the interests he was appointed to protect. A person permitted to intervene in an action cannot interject therein a new issue; and will be refused permission to intervene where he is not a party to the contract in suit, except in so far as he is a stockholder of the corporation against which the contract is sought to be enforced. Hosmer v. Standard Shoe Machinery Co., 204.

2. *Intervening by third parties — Requisites of right — Code C. P.*, § 452. — In 1894 the plaintiff, a foreign city, sued in this action the defendant firm of Coffin & Stanton for the value of city bonds they had sold, wrongfully as alleged, and the city offered to restore to the firm what it had been paid by the firm on account. In 1895 in another action in Michigan, in a Federal court, the bonds were declared void. In 1897 the defendant Wickes, intervening herein as receiver of said firm which had failed in Oct., 1894, recovered of the city, on a counterclaim not defended by it, the amount which the firm had paid the city on account. In 1902 the city was relieved from its default upon the counterclaim on terms, including the privilege to the receiver to hold his judgment provided he returned the city the bonds. Upon an application of bondholders, vendees or pledgees under the firm before action brought by the city, to intervene, avail themselves of the receiver's said privilege, have his judgment amended so as to be a judgment in their favor as the real parties in interest, and have their claims and his adjudicated in this action. Held, that Code C. P., § 452, did not entitle them to any relief. That, if it be assumed that the right to recover what the firm paid the city on account of the invalid bonds attached to the latter and passed with them on sale or pledge, then the firm lost it before they failed, their receiver never took it, and the bondholders have not and never have had any interest in his judgment. That, as the city sought to recover the value of the bonds only, and of the firm only, and did not seek a lien upon any bonds which the firm had sold or pledged, the bondholders had no interest in the subject of the action. That, as the receiver's counterclaim was upon a cause of action for a money judgment only, the bondholders would not be permitted to intervene on their own motion. That this was neither the time nor the method for determining the conflicting claims, of the receiver and of the bondholders, to the money to be derived from his judgment. City of Ironwood v. Coffin, 278.

See **Pleading.**

PARTITION.

1. *Not defeated by an intervening trust containing an inseparable void provision for accumulation — Illegal suspension of the power of alienation — Statute of Limitations — Adverse possession of trustee — Plaintiff not estopped by acquiescence — Trustee protected as to acts past — Family agreement — Sale.*— A trust of real estate, created in 1872, devising the testator's real estate, in four described parcels, to his executors as trustees upon the trust to receive the rents, etc., of the trust estate and out of the first proceeds thereof pay a mortgage on the only parcel that was mortgaged and also his debts, and thereafter pay the residue of the rents of each of the four parcels to each of his four adult surviving daughters for life, the remainder of each parcel to go in fee to the children of the daughter, is void because it is an accumulation of rents and profits not made for the benefit of minors and during minority, and also because it illegally suspends the power of alienation, since it might require a period longer than two lives in being to pay the mortgage and the debts. Where the primary purpose of the testator in creating the trust appears to have been to divide its

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PARTITION —Continued.

income equally among the four daughters for life, the provision for accumulation — necessary to pay the mortgage and debts and so make the shares equal — is so inseparably connected with the trust that that provision cannot be cut off, and therefore the whole trust is void, the four daughters take the *corpus* as heirs and as tenants in common and one of them may bring partition in 1901. Such a cause of action being one which continues during their cotenancy, the Statute of Limitations cannot run against the daughter who sues, as there never was a time when the statute began to run against her. The surviving trustee, made a defendant, cannot set up adverse possession as he never had the fee but only a power to distribute the income. The acquiescence of the plaintiff, for twenty-nine years, in the carrying out of the will, in receiving rents, in the accountings of the executors as such, as trustees, and in the accountings of the sole surviving trustee, do not estop her from suing; and, on the other hand, she cannot now question past acts of the trustees and trustee, or their disposition of the income, in which she has heretofore acquiesced. The doctrine of an executed family agreement is inapplicable to the case of the daughters as no agreement can validate a void trust. Where the four parcels are differently situated and are presently of unequal value, all must be sold since there can be no actual division of them which would be an equal one. Dresser v. Travis, 358.

2. *Equitable conversion — Practical construction of a decree — Reconversion.* — A mandatory direction to executors to sell real estate effects an equitable conversion of it into personalty and the power of sale passes to administrators with the will annexed, but a mere discretionary power does not. The practical construction put upon a decree, construing a will, by the parties to the decree should be followed when not unreasonable. In order to effect a reconversion there must be unanimity of intention among all the parties in interest and it must be shown in a manner satisfactory to the court. Scott v. Douglas, 555.

PARTNERSHIP.

1. *Effect, on the right to liquidate, of a dissolution agreement "vesting" all the assets in the liquidating partner — Replevin.* — Where a written agreement, dissolving a partnership by consent and appointing one partner liquidator, further provides that all stock, book accounts, and other assets of the firm "are hereby vested in him for that purpose", he takes absolute title to them; and therefore where, before completing the liquidation, he dies intestate his administratrix takes them and the surviving partner has no right to, and cannot replevy, them. Smith v. Proskey, 385.

2. *A partner has no right to another partner's inventions.* — A partner has no right or interest in inventions made by another partner although the use of them might facilitate the business of the firm. Burden v. Burden Iron Co., 560.

See **Executors and Administrators; Injunction.**

PATENTS.

See **Corporations.**

PAYMENT.

1. *When a note is a payment — When a receipt cannot be varied by parol.* — Where a vendor receives, at the sale and in part payment of the price, notes of a third party, the presumption is that he accepted them in satisfaction of the debt. Where he then executes to the vendee a receipt which recites that the said notes and a check of the vendee are in full for all claims and demands under the sale, the vendor cannot vary by his oral testimony so much of the written receipt as evidences such satisfaction. Vacheron v. Hildebrant, 61.

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PAYMENT — Continued.

2. *Merchandise as a payment of a promissory note — Construction of a contract.*— A series of five promissory notes, equal in amount and payable respectively in twelve, eighteen, twenty-four, thirty and thirty-six months, was executed under an agreement of the parties that for each five hundred dollars "paid" by the maker to the payee on account of the principal of the notes, in the order of their maturity, the payee should deliver to the maker certain shares of stock. Before the eighteen months' note matured the maker received from the payee merchandise sufficient to pay it but, instead of applying the merchandise to the payment of that note, he, against the maker's protest, applied it to the payment of and satisfied the thirty-six months' note. To an action by the payee on the eighteen months' note the maker interposed the defense of payment. Held, that payment need not be made in money only. That it was erroneous for the trial court to refuse to submit to the jury the question whether the maker ever acquiesced in the action of the payee in the application of the merchandise to the thirty-six months' note. Root v. Kelley, 530.

3. *Must be pleaded.*—Payment, being an affirmative defense, must be pleaded to be made available. Forbes v. Wheeler, 538.

PENAL CODE.

§ 41x. Stryker v. Churchill, 578.
§§ 143, 342. People ex rel. Lewisohn v. Wyatt, 456.
§ 687a. People ex rel. Clark v. Warden, 113.

PLEADING.

1. *Effect on a complaint of a demurrer to a defense.*— A demurrer to a defense entitles the defendant to question the sufficiency of the complaint. National Bank of Republic v. Thurber, 13.

2. *To be sustained on demurrer if possible — Contract and pleading a breach thereof.*— However inartificial a pleading may be, it must be sustained upon demurrer if any cause of action can be spelled out of its allegations. A counterclaim, interposed by an agent to his principals' action for moneys converted, alleging that they also employed him to sell their liquors to certain customers of his own, that they agreed to "furnish liquors of the quality which the same were held out to represent", and pay him a commission on such sales, sets up a contract upon their part to furnish customers liquors of the quality they had been represented to be and a failure to furnish that quality would prevent the agent from earning his commissions. A breach of such an agreement is not sufficiently pleaded by a general allegation that the plaintiffs "did not keep their promise and guarantee", when not accompanied by the particular facts deemed to support this conclusion of law. Various allegations deemed insufficient to allege a breach. Picker v. Weiss, 22.

3. *Separate defense when permissible — Entire contract of sale.— Effect, on duty to accept further deliveries, of a failure to rescind on the first delivery, objected to — Waiver of tender.*— Where a complaint for the price alleges a single sale of 3,000 battery cases, delivery, acceptance and payment of 1,000, tender and refusal of the balance, and the answer denies everything except the making of the contract, the defendant is entitled to interpose as a separate defense its claim that the sale was by sample and the 1,000 cases inferior to it, and this because it could not show these facts, constituting new matter, under the denial. The court, however, held that the separate defense did not set up facts sufficient to constitute a defense, considering that, as the contract was entire and executory and the defendant had not rescinded and restored at the time of the delivery of the 1,000 cases, it had acquiesced in the quality of that lot and must accept the balance if equal in quality. Weil v. Unique Electric Device Co., 527.

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PLEADING — Continued.

4. *Rule to determine whether an action is individual or representative.*— Where the complaint clearly shows that the plaintiff is suing in a representative capacity as trustee of a bankrupt, the fact that, in the captions of both the summons and the complaint, his name is followed by the word "trustee" and not by the words "as trustee" is not fatal to the action as a representative one and this under the rule that the title and the pleadings may be considered together in order to ascertain the true nature of the action and that it will be treated as individual or representative, as disclosed upon an inspection of the whole record. Newland v. Zodikow, 541.

6. *Scope of a demurrer — Requisites of a denial — Frivolous defence — Judgment on demurrer.*—Where an answer consists of two parts, first, a general denial and, second, matter apparently pleaded as a defence, a demurrer "to the defence set up in the answer" upon the ground that upon its face it is sufficient in law aims at the new matter and does not and cannot aim at the general denial. However inconsistent with the allegations of the complaint those of a defence may be, they cannot be accepted in lieu of the formal denial required by the Code of Civil Procedure. A denial must be stated separately and not be mingled with a defence. Where the complaint is for money paid by mutual mistake, an allegation, in defence, that the payment was not made under duress and was voluntary, is frivolous. Where the only issue raised by the answer is that raised by the general denial, the demurrer must be sustained as it cannot lawfully be overruled and the plaintiff be remitted to a motion for judgment on the defence as frivolous or to strike it out as irrelevant or redundant. Jaeger v. City of New York, 543.

6. *Admissions and denials are irrelevant in a defence.*—Admissions are not necessary in an answer, and neither they nor denials are relevant to, or can be allowed in a defence. Sanford v. Rhoads, 548.

7. *Denials must be separated from defences.*— Denials must be stated before and apart from affirmative allegations of an answer to the end that, if the denials are frivolous, the plaintiff may move for judgment on them, or that, if the affirmative allegations are immaterial or irrelevant, the plaintiff may move to strike them out, or demur to them in case they are insufficient as a defence. Carpenter v. Mergert, 634.

8. *Misjoinder of defendants.*— The joinder of an excessive number of defendants is not a defense to a cause of action properly pleaded as to an answering defendant nor would it be to him a ground of demurrer. Adams v. Slingerland, 638.

See **Actions; Agency; False Imprisonment; Mechanic's Lien; Slander; Statute of Limitations.**

POOR.
See **Costs.**

PREFERENCE.
See **Bankruptcy.**

PRIMARY ELECTION LAW.
Primary Election Law — Rules of a general committee, how amended.— Where the existing rules of the county general committee of a political party provide that the executive committee shall consist of one member from each assembly district, the general committee cannot defeat the right of an assembly district to such membership, by, first, having the right of the delegates of that district to membership in the general committee contested, and then passing, without previous notice, a resolution that one person from each uncontested assembly district shall constitute the executive

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PRIMARY ELECTION LAW — Continued.
committee. The practical effect of the resolution is to amend the rules without notice, in violation of the Primary Election Law (L. 1899, ch. 473, § 9, subd. 2) which declares that they shall not be amended except upon reasonable notice. People ex rel. Garvey v. Democratic General Committee, 724.
See **Elections.**

PRINCIPAL AND AGENT.
See **Agency.**

PRINCIPAL AND SURETY.
1. *Action by creditor against surety — When not premature — Demurrer to amended complaint — Construction of surety's obligation.*—Where the defendant is surety by bond to a creditor of the principal for the performance of the latter's contract with the creditor, running from May 8, 1901, to Jan. 1, 1902, and providing for an accounting by the principal at any and all reasonable times, and the defendant further covenants to discharge the obligation nominated in the bond at the "termination" of the principal's contract, an amended complaint of the creditor, served in an action begun by him against the surety on May 22, 1902, is not demurrable where, after setting up the above facts and alleging that on Sept. 1, 1901, an accounting was had by the plaintiff with the principal and a deficiency found, it further alleges that the defendant has not complied with the plaintiff's demand of payment or met the obligations of the bond, has not made good the plaintiff's said loss or paid it on request, and that the plaintiff is "now" suffering a loss in a sum named, because of the defendant's default as surety upon the bond. A surety has a right to have its contract construed strictly. Keene v. Newark Watch Case Material Co., 6.

2. *Invalid levy on goods of a third person — Bond of a city marshal of Brooklyn where enforcible — Its validity.*—A surety, of a marshal of the former city of Brooklyn, which has become bound for his faithful discharge of the duties of his office and in default thereof to pay all damages resulting from such default, is liable to a person where the marshal attaches and sells that person's property by virtue of process running against another person. The marshal must be deemed to have been acting *colore officii*. The bond may be ordered prosecuted, against the surety and the marshal, continued in office by the charter of the city of New York, in the Municipal Court of said city, borough of Brooklyn, and the said charter (L. 1897, ch. 378, § 1428) does not limit prosecution to the County Court of Kings county. The validity of the bond is not impaired by the facts that it was given before, while the breach thereunder arose after, Jan. 1, 1898, when the said charter took effect. Fohs v. Rain, 316.

PROMISE.
See **Account Stated.**

RAILROADS.
Contents of return of board of railroad commissioners to a certiorari to review their certificate that public convenience requires a proposed railroad. — Upon a review by certiorari of a certificate of the state board of railroad commissioners that public convenience and a necessity require the construction of a proposed railroad, the board need not return any statements made to it upon the application for the certificate as to the financial ability of the promoters of the proposed railroad or as to the good faith of the enterprise, and this although the board has a standing rule requiring applicants to make such proof. People ex rel. New York, New Haven & Hartford R. R. Co. v. Board of Railroad Commissioners, 1.

RAPID TRANSIT.
See **City of New York; Injunction.**

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REAL PROPERTY LAW.
See **Statutes.**

RECEIVERS.
See **Supplementary Proceedings.**

REFORMATION.
See **Deeds.**

REPLEVIN.
See **Partnership.**

SALES.
Condition precedent of payment — Damages on vendee's refusal to accept the goods.—Under an executory contract for the sale and purchase of goods at a fixed price, also stipulating that title shall remain in the vendor until full payment of the price or payment of a judgment recovered therefor, the vendor may, where the vendee refuses even to accept the goods, recover of him the balance unpaid of the price and is not limited to damages in the difference between the price and the market value of the goods. Under such a contract the vendor retains title and possession of the goods until full payment of the price or payment of a judgment recovered therefor, but upon payment both title and possession pass to the vendee. Ideal Cash Register Co. v. Zunino, 311.

See **Stock.**

SAVINGS BANKS.
Rule, as to the method of making a gift of a deposit — Gift causa mortis — Affirmative defense.—A depositor of a savings bank is not bound by its rule, forbidding any gift of a deposit unless by an assignment or other transfer in writing signed by the depositor and duly acknowledged, where the rule was made after she became a depositor. Her agreement to another rule that all notices as to deposits or depositors, when published by placards in the bank, should be deemed and taken as personal notice to each depositor, although said rule as to gifts had been placarded in the bank for many years before her death, has not the retroactive effect of binding her to the first above rule. Accordingly, a donee *causa mortis* of the depositor, in possession of the bank book by delivery from the depositor, was allowed to recover the deposit of the bank. *Semble*, that if the first above rule were in any manner available to the bank as a defense it would be matter of confession and avoidance, not available when not pleaded as an affirmative defense. Ranney v. Bowery Savings Bank, 301.

See **Trusts.**

SCHOOLS.
See **City of New York.**

SHERIFFS.
Escape — Effect of the prisoner's discharge in bankruptcy.—Where a debtor, held by a sheriff within the liberties of a jail upon a body execution on a debt provable in bankruptcy, files a petition therein, procures a discharge and thereupon, of his own motion, goes and remains beyond the liberties, the sheriff is not liable to the creditor in the execution as for an escape. Walker v. Harder, 749.

See **Attachment.**

SLANDER.
Insufficient justifications of charges of larceny and of being a "skin."—Where the slanderous charge is that the plaintiff, a tenant of the defendant, stole a gas radiator from the demised premises, it is no justification to answer that the plaintiff wrongfully removed therefrom a gas chandelier, nor can

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SLANDER — Continued.

a charge of larceny be justified by alleging a mere wrongful taking. A charge that a person is a "skin" cannot be justified by alleging that he was in arrears for rent. Christianson v. O'Neil, 11.

SPECIFIC PERFORMANCE.

1. *When refused of an oral agreement to provide for a wife by will — Statute of Frauds — Part performance.*— Specific performance of an oral contract by which a husband, since deceased, agreed for value, as alleged, to will his wife all his property cannot be enforced by her against his estate where she fails to meet the requirement that such a contract must be established by the clearest and most convincing evidence. Where the property in question is wholly real estate, an additional objection to her action arises in the fact that real estate cannot be conveyed by parol and, further, that her alleged payment of the consideration, or services which she alleges that she rendered her husband as part of the consideration, are not such a part performance by her as will take the contract out of the Statute of Frauds. Conlon v. Mission of Immaculate Virgin, 215.

2. *Of a contract to make a gift to one for being cared for during life — The defense of an adequate remedy at law must be pleaded.*—Where a woman, since deceased, comes to the home of a dressmaker and promises her that if she will give up dressmaking, stay at home and take care of the woman, as maid and companion, for the rest of the woman's life, she will give her certain shares of stock, the dressmaker, upon performing, is entitled to specific performance of the contract as against executors of the woman who refuse to surrender the shares of stock to the dressmaker. Where they have not pleaded that she has an adequate remedy at law she will be given the foregoing equitable relief and will not be compelled to sue them as for a conversion of the stock or upon a *quantum meruit* for the value of her services. Le Vie v. Fenlon, 265.

See **Damages.**

STATUTE OF FRAUDS.

See **Specific Performance.**

STATUTE OF LIMITATIONS.

Pleading of.— The provisions of Code C. P., § 388, that "An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues" are not sufficiently pleaded by the defendants' allegation "That the statutory period in which to begin such an action as is here brought, to wit, ten years, has long since expired, and that this action is consequently outlawed". Such an answer contains no averment that more than ten years have elapsed before the commencement of the action since the cause of action accrued. In such case the statement that the action is "outlawed" adds nothing. Schrieber v. Goldsmith, 381.

2. *An amendment to the statute cannot revive a judgment barred by the statute as it stood before the amendment.*—A judgment of a District Court of the city of New York, recovered and docketed in the clerk's office of the county of New York in 1884, became barred, by the Statute of Limitations as then existing, in six years thereafter, and therefore L. 1894, ch. 307, extending the twenty years' limitation to all such judgments *thereafter* docketed in the county clerk's office of the county in which the judgment was rendered, did not and could not give the judgment of the District Court any vitality as it was barred before L. 1894, ch. 307, took effect. Matter of Guttroff, 483.

3. *Action against a stockholder of a full liability corporation created under the Business Corporations Law.*—An action against a stockholder of a

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STATUTE OF LIMITATIONS — Continued.

full liability corporation created under the Business Corporations Law (L. 1890, ch. 567, § 6) does not fall within the limitation of two years as prescribed by the Stock Corporation Law (L. 1890, ch. 564, § 55). Adams v. Slingerland, 638.

See **Decedents' Estates; Liquor Tax Law; Partition; Transfer Tax.**

STATUTES.

Real Property Law (L. 1896, ch. 547, § 284) — When the father inherits.— The provisions of the Real Property Law (L. 1896, ch. 547, § 284), declaring that a surviving father shall inherit from an intestate, who dies without lawful descendants, unless the inheritance came to the intestate on the part of his mother and she be living, apply only to a case where the inheritance came to the intestate directly from his mother. Therefore, where she died testate and left a husband and three sons, Charles, Franklin and Edward, the latter born after her will, and the shares of the first two sons never vested in them absolutely, under the terms of the will, because they successively died intestate, unmarried and without issue, the court considered that a share which passed from Charles, upon his death, to Franklin did not on Franklin's death pass, under the statute cited, to Edward but to his surviving father, and this because Edward would not take directly from his mother and she is not living. Righter v. Ludwig, 416.

See **Appeal; Bankruptcy; Brokers; City of New York; Civil Service; Constitutional Law; Corporations; Creditor's Action; Criminal Law; Deeds; Ejectment; Elections; Habeas Corpus; Injunction; Lien; Liquor Tax Law; Mechanic's Lien; Negotiable Instruments; Office and Officer; Principal and Surety; Summary Proceedings; Taxes; Transfer Tax; Trusts; Villages; Will.**

STAY.

1. *Vacated, when accompanying the allowance of a writ of certiorari to review, and designed to stay the execution of, a determination of a superior city officer dismissing his inferior for cause — Power of the fire commissioner of New York city — Merits — Bias and prejudice — Stay not granted of course — Effect on a stay of Code C. P., § 2131.*—An order, allowing a writ of certiorari to review a determination of the fire commissioner of the city of New York dismissing for cause and after a hearing the chief of the city fire department, should not contain a provision staying execution of the determination until review had. The commissioner has power to try the chief. The stay will be vacated on motion where it has been granted *ex parte*. The stay cannot be supported upon the ground of alleged erroneous rulings of the commissioner nor because his determination is alleged to be against the law and the weight of evidence and this because those questions are for the Appellate Division. Code C. P., § 2140. The stay cannot be supported upon the ground of the commissioner's alleged bias or prejudice where the court at Special Term cannot determine from the record that, assuming they existed, they affected the result. A stay should not be granted in such a case as a matter of course as the interests of the public service require that there should be no stay. Code C. P., § 2131, has not enlarged the right to have a stay in a writ of certiorari, or an order for a stay, but has limited it, and thus has changed the common-law rule under which the writ itself involved a stay and effected it. People ex rel. Croker v. Sturgis, 448.

2. *Relief afforded a claimant in a peculiar situation.*—Where there were preferred and unpreferred claimants of the fund and the referee allowed the former interest from and after the receiver's appointment, and the Appellate Division and the Court of Appeals agreed in reversing this ruling, and the Appellate Division thereafter divided this part of the fund among four unpreferred creditors who had duly filed exceptions to the referee's report, the Special Term considered that a fifth unpreferred creditor, who had also duly excepted to the report, had been represented on the appeal from the

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STAY — Continued.

order confirming it, had moved for a resettlement of the order and for a reargument of the appeal and had been refused by the Appellate Division leave to appeal to the Court of Appeals, had suffered an injustice in being excluded from sharing in the fund, and therefore the Special Term, while making a final order distributing the fund in accordance with the decision of the Appellate Division, granted a stay, pending an appeal from the final order, upon condition that security for interest and costs be given the said four unpreferred creditors. People v. American Loan & Trust Co., 647.

STOCK.

Broker and customer — Fictitious sale — Sale where the margin is exhausted — Demand — Injunction.— Where a customer orders stock brokers to purchase for him certain stock they must buy for him promptly, report the transaction to him, receive the stocks for him, and have the certificates ready for delivery to him whenever he shall call for them and pay the cost. Where as matter of fact the stock brokers have never purchased the stocks for which they have rendered the customer an account, they cannot, in a subsequent action for an accounting between the parties, charge him with a loss resulting from the sale. Where the stocks have been bought on a margin, the brokers cannot, upon its exhaustion, lawfully sell out the stocks unless the customer specifically waives tender of them, demand of payment of the balance due, and notice of the brokers' intention to sell the stocks at a fixed time and place. Where the stock brokers never purchased the stocks the customer is excused from demanding them. Relief by injunction refused. Tuell v. Paine, 712.

SUBROGATION.

See **Equity.**

SUMMARY PROCEEDINGS.

1. *Maintainable under a provision, in a lease, amounting to a limitation of the term but not being a condition of the lease.*— A provision in a lease, for two years from May 1, 1902, that if the lessor sells before the expiration of the first year of the term the tenants shall surrender the demised premises on receiving three months' notice and the equivalent of three months' rent, is not a condition of the lease but is a limitation of the term, *ipso facto* ending it when and as soon as the lessor sells, notifies and pays. Therefore where the lessor gives on May 1, 1902, the tenants notice of a sale made and his *mesne* grantee tenders them on August 1, 1902, the said payment in money, the term ends forthwith, the tenants thereafter hold over after its expiration without the permission of the landlord, within the meaning of the statute relative to summary proceedings, and the *mesne* grantee may dispossess them. Ronginsky v. Grantz, 347.

2. *Action for rent — Provisions of a lease which survive dispossession — Liquidated damages.*— Under a lease providing that a deposit, made by the lessee for security and applicable primarily to the rent of the last two months of the term, may upon his failure to perform be retained by the lessor as liquidated damages for the breach and for her necessity to re-enter by due process of law, she is entitled, after dispossessing the lessee and notwithstanding Code C. P., § 2253, to retain the deposit and as liquidated damages. Lesser v. Stein, 349.

3. *Lease — Rent collectible up to the issue of a warrant of dispossession.*— The issue of a warrant in summary proceedings cancels the lease but does not preclude the landlords from holding the tenants for rent of the premises up to the time when the warrant was issued. Adler v. Kramer, 642.

See **Costs.**

SUPPLEMENTARY PROCEEDINGS.

1. *Untenable where the debtor, a foreign corporation, has ceased to exist as a legal entity — Collateral attack.*— When a foreign corporation has been

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SUPPLEMENTARY PROCEEDINGS — Continued.
duly dissolved in the State of its incorporation it ceases to exist anywhere as a legal entity, an action pending against it in this State falls, and the plaintiff, or creditor, cannot take supplementary proceedings on a judgment subsequently recovered against it here and examine a third party as to property of it alleged to be in the third party's hands. While, in such proceedings, the judgment upon which they are taken cannot be attacked collaterally, the third party may show that the judgment is and was void and therefore is no judgment at all. Matter of Stewart, 275.

2. *A seat in an exchange may be reached even if incumbered by preferred debts to other members — Exemption as "working tools", Code C. P.*, § 1391 *— Form of an order appointing a receiver in such case.*—A seat in the Consolidated Stock and Petroleum Exchange of New York is property which will pass to a receiver, of the property of the member, appointed in supplementary proceedings. If the seat is incumbered by preferred debts to other members of the exchange the equity in the seat will pass to the receiver. *Semble*, that the seat is not exempt under C. P., § 1391, as "working tools" of the member, and, in any event, if worth more than $250, cannot be exempt as to the excess above that sum. Form of an order appointing a receiver where there are preferred creditors of the exchange, and the receiver must act to some extent under its rules. Leggett v. Waller, 408.

3. *Receiver — Future earnings — Vested interest in a pilots' organization.*— A judgment creditor is entitled to have a receiver of the property of his judgment debtor appointed although his examination in supplementary proceedings discloses no property. A judgment creditor cannot reach future earnings of his judgment debtor. Where the judgment debtor, a pilot, has a valuable vested interest in the funds of an organization of licensed pilots, evidenced by a certificate of membership, that interest may be reached in supplementary proceedings and will pass to a receiver when appointed. Dease v. Reese, 657.

SUPREME COURT.
See **Jurisdiction.**

SURROGATE.
See **Surrogate's Court.**

SURROGATE'S COURT.
1. *Jurisdiction over a judgment, against a decedent, disputed by his administrator on the final accounting.*— Where a widow presents as a claim against her husband's estate a decree made nearly twenty years before directing him, as executor of her father's estate, to pay her a sum of money, and the accounting administrator of her husband proposes to contest her claim upon grounds other than payment and possibly by virtue of transactions which may have occurred between the parties subsequently to the decree and which may have changed their rights in the matter, the surrogate will not dismiss the claim as it is established by a judgment, but will not act until the administrator has had sixty days in which to begin an attack upon the decree in some court of competent jurisdiction and failing an attack will determine only such issues in regard to the claim as he may under Code C. P., § 2743. Matter of Wait, 74.

2. *Who may compel an inventory — Lack of jurisdiction as to a disputed claim.*— Only a creditor of, or a person interested in, the estate of a decedent can compel his executors to file an inventory. A person who alleges that he is a stockholder in a corporation out of which the testator as officer and director improperly made large profits — for which the applicant has sued in its behalf because the corporation would not sue — is not a creditor of the estate nor interested in it and therefore cannot compel the executors of it to file an inventory. *Semble*, that there is no general power, apart from the

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SURROGATE'S COURT — Continued.

statute, in the surrogate to order an inventory to be filed and that if he has any discretion in the matter it should not be exercised to order one where the claim upon which the application rests is disputed and unproved. The surrogate cannot try and determine a disputed claim. Matter of Huntington, 477.

3. *Decree to be entered on the release of a surety under Code C. P.*, §§ 2600, 2601.— Where the surety for an administratrix cites her to show cause why he should not be released, and she files a new bond and an account of her proceedings, and he does not object to the latter nor make any affirmative application in the matter, a decree "settling" the account as filed should be entered and the parties interested in the estate need not be brought in by a supplementary citation and be heard. Such a decree would not bind those not made parties to the proceeding, but may be useful as placing on record the sworn declaration of the administratrix as to the condition of the estate when the surety declined to be further bound. Matter of Sogaard, 519.

4. *Compelling part payment of conceded debts although the estate is insolvent and there has been no judicial settlement — Code C. P.*, § 2472, *subd.* 4, § 2722.— Where administrators of an estate have duly published a notice to its creditors to present their claims against it, and the time required for the publication of the notice has expired, and all the numerous claims presented are of equal dignity, and none are disputed by the administrators, and they know of very few claims that have failed to be presented, and they have funds applicable to some payment, the surrogate has power at the suit of petitioning creditors to direct the administrators presently to make a partial payment upon the petitioners' claims, and this although the estate is insolvent, and there has been no judicial settlement of the accounts of the administrators. Where all the claims have been allowed by them, their surety cannot take the objection that non-petitioning creditors may on the judicial settlement succeed in procuring a disallowance of the claims of some of the petitioning creditors. The surrogate, however, provided in his decree that the administrators might apply to have it modified in the event of its thereafter appearing that the estate was insufficient to pay the petitioning creditors the amounts thereby directed to be paid them, or in the event that any of the claims thereby allowed should thereafter be found invalid, in whole or in part. Matter of Miner, 605.

See **Jurisdiction.**

TAXES.

1. *Distribution by supervisors of the tax on bank stock created by L.* 1901, *ch.* 550, § 2 — *Mandamus to cure mistakes in acts purely ministerial.*— A county is not a "tax district" within the meaning of the Tax Law (L. 1896, ch. 908, § 24, as amd. L. 1901, ch. 550, § 2) and therefore is not entitled to share in the distribution of the tax laid by said statute of 1901 on bank stock taxable in the tax district. A board of supervisors, in distributing the said tax as directed by the said statute of 1901, acts ministerially and not judicially, and therefore where the board makes a mathematical error in distribution a peremptory mandamus will issue to it to correct the error. People ex rel. Lawyer v. Board of Supervisors, 162.

2. *Corporation, foreign — Taxable if it is doing, in the State of New York, a continuous and permanent business.*— Where the evidence presented to tax commissioners, relative to the taxability of a foreign corporation, shows that it has taken out a certificate permitting it to do business in the State of New York, that it has therein stated 70 Cortlandt street, New York city, to be its principal place of business within this State, that it maintains here an office, sales room and storage rooms, that it keeps goods for sale here and here sells them, there is an indication of an intention upon its part to do here a continuous and permanent business sufficient to justify its taxation upon the

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value of its goods here in process of distribution, the value of its office furniture here and its cash on hand and in bank here. People ex rel. Carey Manufacturing Co. v. Commissioners of Taxes, 282.

3. *Certiorari to review — Objections to an assessment, how waived or lost — Insufficient statement of overvaluation — Reference denied.*—Where a corporation, claiming to be aggrieved by the assessment of its real estate located in the city of New York, applies in writing to the tax commissioners for its reduction (L. 1897, ch. 378, § 895) and does not, in its application, sufficiently allege inequality as a ground of relief and does not allege it at all in its subsequent petition under the Tax Law (L. 1896, ch. 908) for a writ of certiorari to review the assessment, the objection as to inequality is waived. A writ of certiorari brings up for review only such objections as were made before the tax commissioners and consequently the petition for the writ cannot expand the objections. A statement, in such an application, that the relator and applicant's real estate has been assessed at a valuation of $905,000 "whereas the same should not have been, in its judgment, valued at more than $500,000 to be * * * in accordance with the fair marketable value thereof", does not allege overvaluation as a fact, and is a mere opinion, presumably of an officer of the corporation, not shown to be qualified as an expert, in regard to overvaluation. Therefore, it is insufficient to justify the court in concluding that, within section 253 of the Tax Law, "testimony is necessary for the proper disposition of the matter" and a motion for a reference must be denied. Allegations as to the deterioration of the real estate (an underground conduit system) held insufficient to show that there had been an overvaluation. People ex rel. Edison Electric Illuminating Co. v. Feitner, 463.

4. *Certiorari to review — Reference, when ordered — Capital stock, how assessed — Valuation of realty not to be increased by the aggrieved party on review.*— The court will order a reference (L. 1896, ch. 608, § 253) to take testimony in a proceeding to review an assessment by certiorari only where the application for a reduction tenders a question of fact and contains a statement of fact which, if taken as true, would require a reduction or cancellation of the assessment. The taxable value of the capital stock of a corporation is to be ascertained by adding together the actual value of its realty and its personalty and deducting therefrom its debts and the assessed value of its realty. Where the first two items amounted to $506,847, the debts to $55,000, and the assessed value of the real estate of the corporation was given by it in a preliminary written statement to the tax commissioners as "over $400,000", the court approved an assessment of the capital stock at $51,800 — its actual value not being stated nor whether it was worth less than par. Where a corporation has thus declared the assessed value of its real estate to be "over $400,000" and has never claimed to the tax commissioners any other value, its statement of value must be regarded as approximately true, and therefore no consideration should be given to a subsequent value of $460,000 first alleged in a petition for a certiorari to review the assessment. People ex rel. Cord Meyer Co. v. Feitner, 467.

5. *Certiorari to review — Reference, when ordered — Where an assessment is void the party aggrieved is excused from making a preliminary application to "correct" it.*— Where city tax commissioners assess in their "annual record", without locating them, a corporation's "foundations, sub and superstructures, conduits, pipes, wires, cables, and connections" and insist upon a right to tax them because they are located on private property, as the tax commissioners claim, and the corporation insists that the foundations, etc., are not taxable locally because, as it claims, they are located in or under highways and taxable only as special franchises and as such only by the State board of tax commissioners, a question of fact is presented which requires evidence to be taken for its determination and therefore a reference will be ordered to that end. The statutory rule that a party aggrieved by an assessment can-

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TAXES — Continued.

not review it by certiorari unless the party has timely applied to the proper officers to have it "corrected" does not apply where it is void because the tax officials had no right to make it. People ex rel. New York Edison Co. v. Feitner, 474.

6. *Front-foot rule of assessment, when rejected —Proper method.*—Where the Legislature has prescribed (L. 1897, ch. 414, § 268), as the method of assessing a village sewer's expense, that it be assessed upon the lands within the area of local assessment in proportion as nearly as may be to the benefit which each parcel or lot will derive therefrom, and has further directed that the ratio of such benefit shall be established, the village sewer commissioners cannot lawfully adopt the front-foot rule of assessment where that results in assessments which do not comply with the statutory rule. The commissioners should, in each case, consider the effect of the improvement upon the actual market value of the property and, in that connection, the question whether the property is vacant or improved and, if unimproved, the extent and value of the improvement. Matter of Wheeler, 484.

7. *Oneida county — L.* 1902, *ch.* 559; *L.* 1896, *ch.* 908, §§ 134, 138 — *Statutory construction.*— Sections 134 and 138 of the Tax Law of 1896, requiring a purchaser of lands at a tax sale, not redeemed therefrom, to serve, in order to complete his title, a written notice to redeem upon any occupant or mortgagee of the lands, were not impliedly repealed as to Oneida county by L. 1902, ch. 559, a special act as to taxes in that county, and therefore where there has been no compliance with these sections of the Tax Law at a sale had in that county the purchaser cannot dispossess the occupant or a mortgagee in possession. Where a special act declares that certain articles of the Tax Law, except certain enumerated sections, shall not apply to a county, the sections excepted are deemed to be embodied in the special act and they apply to the county. Where the special act prescribes a notice to redeem published by the county treasurer and the Tax Law a written notice, with personal or mail service, the Tax Law governs redemption as being, of the two conflicting provisions, the one more just to the rights of all parties in interest. Said sections 134 and 138, although in words applying only to a sale made by the State Comptroller, apply also to a sale made by the county treasurer for State and county taxes. Gabel v. Williams, 489.

See **Certiorari.**

TENDER.

Waiver of.— Tender of the balance is waived where the vendee notifies the vendor, upon acceptance of the 1,000 cases, that it will not accept future deliveries unless equal to the sample. Weil v. Unique Electric Device Co., 527.

TENEMENT HOUSE ACT.

See **Habeas Corpus.**

TESTAMENTARY CAPACITY.

See **Will.**

THEATRES.

See **City of New York; Lease.**

TITLE.

1. *Building restriction.*—In January, 1886, one Monteith, the owner of eighty-four feet on the north side of a street running east and west, conveyed to one Williams the easterly twenty-five feet with a covenant that any building erected on it should be set back from the building line at least sixteen feet, and, in February, conveyed to him the next westerly eighteen feet with a set-back covenant which expired in 1901. In 1892 Monteith's executors conveyed to one Westervelt the remaining forty-one feet without such a covenant. No general scheme existed in the locality to set back the houses sixteen feet from

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TITLE — Continued.

the building line nor did Monteith impose any such restriction upon lots he owned upon the south side of the same street. A purchaser from the defendant, of a plot containing seven feet of the twenty-five foot plot, refused the title as unmarketable and sued for what he had paid on account. Held, that the title was marketable. That the covenant ran only to Monteith. That if an easement ever existed in favor of the eighteen foot plot, it was extinguished when, in February, 1886, the title to it and to the twenty-five foot plot united in Williams, and the easement was not revived by him. That Monteith did not intend to reserve for the forty-one foot plot any easement over the twenty-five foot plot and that, if he did, his executors did not, by their deed to Westervelt, convey to him any easement that any building, whenever it might be erected on that plot, should be set back. Schwoerer v. Leo, 505.

2. *Building restriction — Reformation of a contract, for mutual mistake, denied — Failure of proof of mistake.*— An existing enforcible restriction forever preventing any building, erected upon the land contracted to be sold, from being built out to the street line entitles the vendee to reject the title where the contract of sale calls for a fee simple. Roussel v. Lux, 508.

See **City of New York; Contract.**

TORT.

See **Actions.**

TOWNS.

See **Office and Officer.**

TRANSFER TAX.

1. *When a remainder is not taxable.*— A remainder is not presently subject to the transfer tax where it is limited to children of the life tenant, or her appointees by will, and she is not shown to have any children, as, in such case, no transfer, defeasible or otherwise, of the remainder has yet been made. Matter of Clarke, 73.

2. *Comptroller's absolute right to an appraisal where the estate however small has never been taxed or exempted.*— The State Comptroller is not precluded from taking in 1902 proceedings to assess the transfer tax upon the estate of a woman who died, and whose will was proved, in 1895, by the fact that the proper surrogate, upon the basis of the executor's affidavit that the estate was too small to be taxable, then orally expressed to counsel for the estate an opinion to the same effect — it appearing that no decree was then or ever entered taxing or exempting the estate and that consequently no notice of an appraisal was ever given to the persons legally entitled thereto. Matter of Schmidt, 77.

3. *Deductions for expenses of administration and for taxes.*— In proceedings taken to determine the value of an estate for the purposes of the transfer tax, the reasonable cost of a burial plot, proper for the decedent, as well as the cost of fencing and sodding it, must first be deducted as an expense of administration or of the funeral. There must also be deducted taxes upon his real estate when the same were due and payable before he died and this because it is the absolute duty of executors to pay such taxes and they would be censurable if they did not pay them. Matter of Liss, 123.

4. *Refunded when paid under a statute declared void after payment.*— After the Court of Appeals has declared unconstitutional a statute (L. 1899, chap. 76) imposing a transfer tax upon certain remainders and reversions, persons who paid that tax but did not appeal within the time fixed by law from the decree imposing it may move to vacate the decree and may have their payments refunded, as the court of the surrogate has power to vacate its decree when void because rendered under a statute subsequently declared unconstitutional. Matter of Scrimgeour, 128.

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TRANSFER TAX — Continued.

5. *On contingent or defeasible estates in expectancy — Retroactive force of L.* 1902, *ch.* 496.— The language of the Tax Law (L. 1896, ch. 908, § 230 as amd. L. 1901, ch. 173; 1902, ch. 496), that "Estates in expectancy which are contingent or defeasible * * * where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof", indicates a legislative intention to make that part of said section 230 retroactive, and therefore the fact that an appraisal for the transfer tax was had in the estate of a testatrix in 1891 does not entitle the owners, or their representatives, of contingent or defeasible estates in expectancy, created by the will, and which vested in beneficial enjoyment or possession on or after May 7, 1902, to pay the tax on their shares upon the values thereof as determined in 1891 — and a new appraisal as to the value of their shares is necessary. Matter of Hosack, 130.

6. *Debt on open account due a non-resident decedent from a domestic joint stock association not taxable — Domestic life insurance policies payable to the estate of such a decedent not taxable.*— A debt on open account due by a domestic joint stock association to the estate of a non-resident decedent, at his death its president and the owner of a majority of its stock, is not subject to the transfer tax for the reason that it is a mere chose in action whose *situs* is the domicile of the decedent. Policies by which domestic corporations insured the life of such a decedent for the benefit of his estate, kept by him in the State of New York and which were here when he died, are not subject to said tax as they cannot be deemed property capable of having a *situs* apart from the person of the payee. Matter of Horn, 133.

7. *A power of appointment given a domestic testatrix by a foreign will over foreign property and exercised by her under foreign law is not taxable.*— Where a non-resident testator, whose property was and remained wholly in the State of his domicile, after creating by his will, in trustees resident there, a trust for his daughter for life, gave her power to appoint the remainder after the trust, the surrogate considered that the exercise by her, at her death a resident of the State of New York, of this power by a will executed and proved here, did not, under L. 1896, ch. 908, § 220, subd. 5 as amended in 1897, subject the shares of her appointees to the transfer tax, and this because the property had been wholly without this jurisdiction, the laws of the foreign State had controlled the whole matter, there had been no transfer under our laws and none whatever beyond the fact shown that the foreign trustees, when so ordered by the foreign court acting under the daughter's will which had been probated therein and followed thereby, paid her appointees their shares. Matter of Thomas, 136.

8. *Not leviable upon the exemptions given a widow by Code C. P.*, § 2713.— In view of the declaration of Code C. P., § 2713, that if a man having a family dies leaving a widow and no minor child the articles enumerated in said section "shall not be deemed assets" but shall belong to her, they form no part of his estate and are not subject to the transfer tax, whether or not they were actually set apart to her by the appraisers and whether or not he died testate. Matter of Page, 220.

9. *Compromise of a disputed claim — Deduction of disbursements to protect at law, or buy peace for, the estate.*— Where an administratrix makes an advantageous compromise of a claim, existing in favor of her estate, and which was disputed by a third person, the transfer tax is to be imposed only upon what she received in settlement of the claim and not upon its face value. Disbursements honestly and properly made by a personal representative, in asserting by litigation a right of the estate or in defeating an attack upon it or in buying peace for it, should be allowed the representative and be deducted in a proceeding taken to fix the transfer tax on the estate. Matter of Thomas, 223.

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TRANSFER TAX — Continued.

10. *Statute of Limitations.*— A testatrix died Jan. 12, 1893, when L. 1892, ch. 399, as to taxable transfers, was in force. In 1899, chapter 737 was passed which declared that the Statute of Limitations should no longer be a defense to a proceeding to collect the transfer tax. On Nov. 18, 1902, an order was made fixing that tax on the estate. In a proceeding by the district attorney to enforce payment of it. Held, that the defense of the six years' statute was untenable. That, assuming the transfer tax to be "a liability created by statute", and barred in six years under Code C. P., § 382, subd. 2, and that the tax could not have been enforced under L. 1892, ch. 399, until eighteen months after the death of the testatrix on Jan. 12, 1893, a proceeding to collect it could have been taken at any time before July 12, 1900, and that before that date L. 1899, ch. 737 had taken away the defense of the statute. *Semble*, that a repeal of a Statute of Limitations may lawfully be retroactive. Matter of Moench, 480.

11. *Remainder when taxable since L.* 1899, *ch.* 76.— For the purposes of L. 1899, ch. 76, a constitutional enactment, a transfer is the passing of the title of a valuable interest out of and from the estate of a decedent, although the transferee is not now ascertainable, and is presently taxable however obscure and contingent ultimate vesting may be. Accordingly held, that remainders, after a trust for a surviving daughter of a testator, appointable by her out of the *corpus* "to and among such persons and corporations who may be living or in existence at her death" and to any of his descendants "who may be living at her death" were presently taxable and this notwithstanding L. 1896, ch. 908, § 220, as amended by L. 1897, ch. 284, § 2. Matter of Le Brun, 516.

12. *Sufficiency of prima facie proof that a testator stood to a legatee in the mutually acknowledged relation of a parent.*— Where an executor establishes by *prima facie* evidence that his testator stood to his residuary legatee, a woman, in the mutually acknowledged relation of a parent continuously for more than ten years before his death and that such relationship began at or before her fifteenth birthday, the tax on her legacy must under L. 1898, ch. 88, § 1, be fixed at one per cent., and no more. Matter of Lane, 522.

13. *Good will not taxable.*— A transfer of the good will of a business is not subject to the transfer tax as in no view is good will real estate, and it is not "personal estate" or "personal property" within L. 1896, ch. 908, § 2, subd. 4. Matter of Dun, 616.

14. *Estate less than* $10,000.— An estate less than $10,000 in value is subject to the transfer tax, as fixed by the Tax Law of 1896, only when that part of it passing to persons not specifically exempted by statute equals or exceeds $500 in value. Matter of Conklin, 771.

TRUSTEES.

Several — Entitled to only one commission on annual income unless it amounts to $100,000.— Unless a trust estate's annual income amounts to $100,000, the trustees, however numerous, are together entitled to only one commission on the income. Matter of Holbrook, 139.

See **Trusts.**

TRUST COMPANIES.

See **Negligence.**

TRUSTS.

1. *Active trust in personalty — Separable void provision for accumulation — Person presumptively entitled to the next eventual estate — Accumulation of an infant's income after majority.*— A devise of an estate, wholly personal, to the testator's adult daughter if her husband dies before him but, otherwise,

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to trustees for her with directions to them to accumulate the profits until, and transfer and convey the estate, etc., to her upon, her husband's death, and if she dies before him the property to pass to a grandson, creates, living the husband, a valid active trust, not invalidated by the separable void direction for an accumulation not for the benefit of and during the minority of an infant or infants. Profits accumulated thereunder will belong to her, under L. 1896, ch. 547, § 53, and 1897, ch. 417, § 2, because she is the person presumptively entitled to the next eventual estate, since the trust was made primarily for her benefit. A direction to accumulate the income on a legacy to an infant until he reaches the age of twenty-five years is valid until, and void after, majority, and therefore he will be entitled to the income after majority and until he becomes twenty-five, and thereupon to the principal as it was when he became twenty-one. Tobin v. Graf, 412.

2. *Trust, in a savings bank deposit — Failure to inform the donee in regard to the trust — Effect of the donor's withdrawals.*— Where a mother opens a savings bank account "in trust" for her daughter, and thereafter declares to others that she has done so, the valid trust thus created is not invalidated by the facts that she did not inform her daughter of the trust, always retained the bank book, and made, at different times during nineteen years, large withdrawals from the fund. The *corpus* of such a trust is no part of the donor's estate. The daughter can make no claim against her mother's estate because of the latter's withdrawals, as the latter was not bound to maintain the fund at the highest point it had ever reached, and particularly where it appears that the daughter had the benefit of some of the withdrawals. Matter of Biggars, 426.

3. *Testamentary trust in personalty — Construction — Right of a remainderman in a fund to have a trustee of it appointed where all the original trustees have died.*— A bequest giving the testator's daughter, Melinda, "the interest or income as it accrues" of a named sum of money during her natural life, to be set apart in certain of his stocks, with further directions that at her death the fund is to go to her legal issue equally after they have reached majority, creates a valid active trust but negatives the idea that Melinda is ever to have the principal. Where the executors, after setting apart the fund and for some time paying over its income to Melinda as trustees, have all died, administrators with the will annexed have no right to hold the fund and a daughter of Melinda is entitled as remainderman to bring, while Melinda is living, an action to have a trustee of the fund appointed and have it paid over to him. Jewett v. Schmidt, 502.

4. *Beneficiary dealing with the corpus — Written statement of the trustee, as to the corpus, binding the beneficiary.*— After a foreign will had been declared, in an action in the proper foreign court, to establish, in the husband of a child of the testator, a valid active trust for her benefit and that of her children, with remainder to them in fee after her death, the husband and wife, residents of the State of New York, ignored the trust, dealt with the *corpus* as if presently belonging to the wife and the children and as if he were its manager, soon put many trust securities in her name, bought with trust moneys new securities running in her name, kept a joint bank account and had equal access to the trust securities, which were kept in a box of the defendant depositary. After his death, which preceded hers by about ten months, a statement of his account as trustee was found in his safe and this showed the amount of the *corpus*, that his commissions and expenses had been paid, and that old and new securities, kept in said box, belonged to the trust. The box also contained a note given by her to him as trustee which balanced the account. Held, that the statement was competent evidence against her and her estate to show the true ownership of the securities found in the box and that it was not excluded by Code C. P., § 829. Putnam v. Lincoln Safe Deposit Co., 738.

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TRUSTS — Continued.

5. *Resignation of trustee.*— Testamentary trustees, who are also testamentary guardians of an infant, will not be permitted to resign the former trust and continue in the latter, for, if they are incapable of acting as trustees, they cannot be capable of acting as guardians. Where trustees resign of their own motion, they, and not the fund, should bear the expense of the application. Matter of Abbot, 760.

ULTRA VIRES.
See **Corporations.**

UNDERTAKING.
Surety — Liability on a bond given for an attachment later vacated — Invalidity of separate defenses alleging the misfeasance of the foreign attorneys of his principals and a pending appeal from the order vacating the attachment.— Where local attorneys, assignees of their non-resident clients' rights under an attachment issued against them but afterwards vacated and an appeal from the order vacating abandoned, as the attorneys allege, thereafter sue the surety, on the undertaking given to procure the attachment, to recover the value of their services to their clients, it cannot avail him to set up by a separate defense that foreign attorneys of the plaintiffs in the attachment action were so derelict in serving on the said non-residents the summons therein that the attachment was vacated, nor is it a defense to him to allege that the appeal from the order vacating is still pending where he does not also allege a stay of proceedings or that in substance. Powell v. Bursky, 533.

UNDUE INFLUENCE.
See **Will.**

VAGRANCY.
See **Habeas Corpus.**

VILLAGES.
Proposition for a village sewer system must be submitted at an election to the qualified voters.— The Village Law (L. 1897, ch. 414, §§ 260, 261, 263) requires a proposition for the adoption by a village of a sewer system to be submitted, in the form required by the statute, at an election to the voters of the village qualified to vote thereat, and therefore village bonds, issued by virtue of a proposition, adopted by a majority of all the voters of the village, and which merely embodied a prior resolution passed by the village trustees authorizing them to borrow a certain sum to construct a sewer system and raise the money by tax, are void and the village may show that fact even as against a *bona fide* holder. Village of Brockport v. Green, 231.

See **Taxes.**

WARRANT.
See **Criminal Law.**

WHARVES AND WHARFAGE.
See **City of New York.**

WILL.
1. *Undue influence.*— Where a testator was old, deaf, feeble and unable to read or write and his will, made a few days before his death, was dictated to the scrivener by one beneficiary and was executed in the presence of both, one son and a wife of one year's standing, and it without apparent reason disinherited another son and a grandchild, the surrogate rejected the will, holding that whether or not the testator was upon the testimony of sound mind he had undoubtedly been subjected to undue influence in the matter. Matter of Elster, 63.

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2. *Fee — When not cut down by subsequent words.*— Where a will contains, primarily, a clear devise in fee it will not be cut down by subsequent words of ambiguous or doubtful meaning. A testator, after dividing the remainder of his estate into six equal shares and disposing of five of them, used the following language: "The other of such equal shares or portions, I give, devise and bequeath to my daughter Eliza Davis, free from all claims of any creditor or creditors, and should in the opinion of my executor, the said income be at any time in danger of being levied upon, or be levied upon by a judgment creditor, or other creditor, by any proceeding whatever, then I direct that said income shall cease as to my said daughter, and the same be divided into as many equal parts as there are children born of her body, then in being, and each of such children shall then receive one of such equal shares or portions". Held, that the daughter took a fee under the words "I give, devise and bequeath", and that the words subsequent thereto must be deemed inconsistent and nugatory. Davis v. Davis, 90.

3. *Vesting — When immediate under a direction "to pay" in the future.*— The rule, that where the only gift of a fund is found in a testamentary direction to executors to "assign and pay" at a future time vesting is postponed until payment, will not defeat a vesting at the death of the testator where the postponement of payment is for the convenience of the estate only. Kunhardt v. Bradish, 103.

4. *Life estate — With power to life tenant to use the principal "for his comfort."*— Under a gift and bequest, made by a wife to her husband, of the use of all the property of which she may die possessed, subject to any bequests she may name, and under the further provision that he is to have the use and income of all said property during his life and any part of the principal that may be needed "for his comfort", he is the sole judge of the amount of principal he needs for his comfort and support, and dying, next of kin of the testatrix cannot restrict the bequest by seeking to compel his executors to show what his individual income was or what sum was actually sufficient and necessary for his support and comfort. Matter of Parsons, 126.

5. *Republished by codicil — Absolute vesting of the remainder in the widow and issue of a person under a direction that his share be invested for his benefit during his life "and for the benefit of his wife and his issue after his death".*— A codicil, referring to a will, and duly executed, republishes the will in so far as it is not changed by the codicil. The will of Harriet M. Kemp left everything to her husband but provided that in case of his death the estate was to be equally divided between her brother, John B. Mee, her sister, her nephew and her niece. It further provided: "I hereby direct that the share due my brother, John B. Mee, be invested by my executors for his benefit during his natural life and for the benefit of his wife and his issue after his death". After the death of her husband the testatrix made a codicil, "In supplement of the foregoing will", which did not alter the provision above quoted in regard to John B. Mee. He died intestate, after the testatrix, leaving a widow and son. Held, that the remainder, after his death, vested absolutely in them. That the contention that they had only an interest for their joint lives, with remainder to the heirs of Harriet M. Kemp, was untenable. Illensworth v. Illensworth, 194.

6. *A bequest revoked by implication — Meaning of "amend" and "instead of"— Vesting of a remainder.*— The fourth item of the holographic will of a layman, who left a daughter Hattie, who has since died leaving a son, the plaintiff in this action for a construction of the will and now of age, created for her in his executors a life trust and further provided that after her death the income should be used for the support, etc., of her surviving issue, if any, during minority, the principal to be thereupon paid the issue, but that, if no issue survived or if the issue died before "maturity", the principal should go

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equally to the testator's "remaining children". He made a second codicil as follows: "Under section four of said will I have given to the issue of my daughter Hattie at her death the entire principal real and personal of the fund held by my executors in trust for her use and benefit during her life: This bequest I hereby amend by giving to said issue the income of said fund instead of the principal and, with this end in view, I hereby give to my executors full power and authority to act as trustees of said issue and in like manner and respect as in the case of Hattie during her lifetime". Held, that the plaintiff took only a life interest in the *corpus*. That the "remaining children" took the remainder, that it vested in them upon the testator's death, and that vesting was not affected by a power given the executors to sell any property held in trust for his daughters (there were two) upon their consent, with directions to the executors to reinvest the proceeds. Cruikshank v. Cruikshank, 401.

7. *Testamentary capacity — Delusion in regard to a wife's infidelity.*—A will that is the offspring of a delusion should be set aside. A person is under a delusion where he, without cause or evidence, firmly and persistently believes in, and acts upon, certain premises as existing facts when no such facts really exist. Where a testator gave his dependent wife, of thirty years' standing, only the income for life on $1,000, and gave the rest of his property, amounting to $6,000 to his next of kin and charities, and it appeared that he, during nearly all of their married life had believed her to be, and had talked of her as, unfaithful to him — although there was no ground for the charge — the surrogate set the will aside at the wife's instance as produced by the testator's delusion in regard to her infidelity to him. Matter of Jenkins, 618.

8. *Contingent remainder — Division per stirpes.*— A testator gave his residuary estate to his wife for life, thereafter to his sister Mary Stewart and his brother David Walker "who shall then be living, jointly, share and share alike forever", and, after the deaths of his wife and his sister, he gave it "to Chestine Stewart, Archibald Stewart and Mary Stewart, or the survivors of them, children of my said sister and to Robert Walker, David Walker, sons of my brother David Walker and Isabella and Christine and two other daughters of my said brother, whose name I cannot now recollect, jointly, share and share alike, or to the survivors of them". His wife is accounting as his executrix and is to receive a gross sum for her life interest. Mary Stewart and David Walker have died. Held, that as they died before the wife they never took any interest in the estate. That, subject to the said payment to the life tenant, the children of Mary Stewart, or the survivor of them, took, as representatives of their mother, one-half of the estate and that the children of David Walker took the other half. Matter of Walker, 680.

9. *Action to establish a will and determine rights under conflicting wills of the same testatrix — Receiver.*— Where three persons claim adversely to each other under three separate wills of a testatrix, alleged, by the beneficiary of the oldest will, to have been suffering from senile dementia for the last two years of her life and when she executed the two other wills, the said beneficiary may maintain an action in the Supreme Court to establish her will and therein may have the beneficiaries of the other wills enjoined from proceeding to probate them —to the end that the rights of all the claimants may be established in one action rather than in a series of contests in the Surrogate's Court. Where the plaintiff also asks that certain transfers, from the testatrix to the chief beneficiary under the second will, be decreed void, that he turn over to the executors of the oldest will the property transferred and be enjoined from disposing of any property he received from the testatrix, property is involved as the subject of the action, and therefore the Supreme Court may appoint a receiver; but where it appeared that, under the second will, a trust company had already been appointed temporary administrator, the court intimated that it would not appoint as receiver any one other than the trust company. Le Brantz v. Conklin, 715.

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WILL — Continued.

10. *Legacy — Dependent upon the time of, but not upon continuous, service — Legacies, when cumulative.*— The will of a testator gave to each of his employees who had, at his decease, been employed "as long as two years, and less than five years", $500, and to each one who had been employed "for less than a period of two years", $100. Held, that one who had been employed continuously, before the testator's death, for only sixteen months but who had, counting various times of service, been employed for four years in all, was entitled to $500. A person mentioned in a will as entitled to a specific sum and who is also named therein as one of a class of legatees is entitled to take both legacies. Matter of Becker, 756.

11. *Execution.*— The Statute of Wills (2 R. S. m. p. 61–63, § 40) does not require that a testator's declaration to the witnesses, that the instrument subscribed by him is his last will and testament, be made to both witnesses at the same time nor does it require them to sign as witnesses in the presence of each other. Matter of Diefenthaler, 765.

12. *Executor — Refused commissions as trustee — Beneficiary as sole trustee.*— Where the will of a testator, giving his wife the income from all his estate until she remarries or dies as well as the right to use the principal if she needs it, declares that she is to hold the property in trust but imposes no duty upon her as trustee which is not hers as executrix, her executors are not, after she has received full commissions upon the estate as sole executrix upon an intermediate accounting, entitled to claim in her right commissions upon the estate as trustee. No person can be trustee for herself and where a will makes the sole beneficiary sole trustee she cannot act and is not trustee. Matter of Hitchins, 767.

See **Devise; Interest; Legacy; Partition; Trusts.**

WITNESS.

Evidence — When no adverse presumption arises from a failure to call a witness.— The failure of a railroad company to call as witnesses, upon the trial of an action brought against it by a passenger for injuries alleged to have been caused him by its negligence, certain other passengers who were in the car at the time of the accident, and whose names the conductor then took, creates no presumption that they if called would have testified against the company. Yula v. New York & Queens County R. Co., 59.

See **Criminal Law; Evidence.**

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